IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82 5088

CECIL C. JOHNSON, JR.,

Petitioner

V.

THE STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

TENNESSEE

ATTORNEYS FOR PETITIONER:

J. MICHAEL ENGLE
Suite 100, 306 Gay Street
Nashville, Tennessee 37201
615/244-6583

ROBERT L. SMITH
Suite 1000, Parkway Towers
Nashville, Tennessee 37219
615/244-4850

THE QUESTIONS PRESENTED FOR REVIEW

I. Did the State's action in converting an alibi into testimony for the prosecution's case-in-chief accumulate with other prosecutorial improprieties to violate the petitioner's Sixth and Fourteenth Amendment rights with consequence to the verdicts of guilt and judgments of death?

A. Under what circumstances is a critical, subpoenaed alibi witness protected by the defendant's right to compulsory process such that successful prosecutorial intimidation violates the defendant's due process right to present a defense?

B. Once a defendant's alibi has been destroyed by prosecutorial misconduct, is the significance of lesser prosecutorial improprieties expanded to test whether the cumulative effect of the State's actions denied the petitioner a fair trial complying with due process?

II. Is expert testimony upon the general moral development of youth and the effect of age upon accountability for decision-making relevant to consideration of the petitioner's youth as a mitigating circumstance, once the issue of whether the petitioner could rely upon this factor had been joined in opening statements at the sentencing hearing, such that the exclusion of this evidence denied petitioner an opportunity to present a mitigating defense?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

MISCELLANEOUS MATERIALS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

CECIL C. JOHNSON, JR.,

Petitioner

V.

THE STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

TENNESSEE

MAY IT PLEASE THE COURT:

Cecil C. Johnson, Jr., the petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Honorable Supreme Court of the State of Tennessee, as entered on the 3rd day of May, 1982 with summary denial of a petition to rehear entered on the 21st day of May, 1982.

THE OPINIONS BELOW

The May 3rd, 1982 opinion of the Supreme Court of Tennessee is officially reported at 632 S.W.2d 542. The original draft of the opinion is appended to this petition (Appendix A).

A petition to rehear was filed on May 13th, 1982 and was summarily denied on May 21st, 1982. A copy of this order is appended to this petition (Appendix B).

Although the opinion below ordered the petitioner's execution on June 29th, 1982, the Supreme Court of Tennessee issued a stay pending the filing and disposition of this petition (Appendix C). Thus, petitioner does not seek a stay of execution from this Court.

The trial court made several written opinions and oral findings that are pertinent to this petition. The first of these include brief remarks made from the bench of the conclusion of the hearing upon the motion for a new trial on March 6th, 1981 (Appendix D). On March 9th, 1981, the trial court entered a written order denying the defendant's motion for a new trial (Appendix E). As this order makes numerical reference to the propositions set forth in the defendant's written motion and is not, therefore, comprehensible without reference to that text, petitioner's motion for a new trial is also appended to this petition (Appendix F).

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Tennessee was entered on May 3, 1982. A timely petition for rehearing was denied on May 21, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In all criminal prosecutions, the accused shall enjoy the right . ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sixth Amendment, the
United States Constitution

. ...(N)or shall any state deprive any person of life, liberty, or property, without due process of law . . .

Fourteenth Amendment, the
United States Constitution

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any . . . robbery . ... is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. §39-2402 (1977)

(a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as a part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . .

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances . . . ; and any evidence tending to establish or rebut any mitigating factors . . .

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death . . .

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of one or more of the statutory aggravating circumstances, which shall be limited to the following . . . :

(3) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder . . . ,

(6) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) the murder was committed while the defendant was engaged in committing . . . any . . . robbery . . .

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) the defendant has no significant history of prior criminal activity . . .

(7) the youth or advanced age of the defendant at the time of the commission of the crime . . .

Tenn. Code Ann. §39-2404 (1977)

Whenever the death penalty is imposed for murder in the first degree and upon the judgment becoming final in the trial court, the defendant shall have the right of direct appeal from tht trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction . . .

Tenn. Code Ann. §39-2406(a) (1977)

STATEMENT OF THE CASE

A. How did the case proceed in the courts below?

This crime occurred in Nashville, Tennessee on the evening of July 5, 1980. Cecil C. Johnson, Jr., the petitioner, surrendered himself to inquiring police officers on the next day. Within one (1) month, he had been indicted by the Davidson County Grand Jury as the sole perpetrator of seven (7) felonies arising from the episode. Upon a plea of not guilty, his trial began on the 13th day of January, 1981. On the 19th day of January, the jury returned verdicts of guilt upon each of the counts as originally indicted and sentenced the petitioner to the statutory maximum punishment as follows:

Count 1. Robbery Accomplished with the Use of a Deadly Weapon upon the bodies of Robert Bell, Jr. (the surviving owner of a neighborhood market) and Robert Bell, III (his twelve year old son) involving the theft of money --- Life Imprisonment;

Count 2. Robbery Accomplished with the Use of a Deadly Weapon upon the body of Louis E. Smith (a surviving auto mechanic working in the market) involving the theft of a driver's license --- Life Imprisonment;

Count 3. Murder in the First Degree upon the body of Robert Bell, III;

Count 4. Murder in the First Degree upon the body of James E. Moore (the driver of a taxicab parked in front of the market);

Count 5. Murder in the First Degree upon the body of Charles H. House (an apparent passenger in the taxicab who had entered the market during the robbery and had been ordered out by the assailant);

Count 6. Assault with Intent to Commit Murder in the First Degree upon the body of Robert Bell, Jr. --- Life Imprisonment; and

Count 7. Assault with Intent to Commit Murder in the First Degree upon the body of Louis E. Smith --- Life Imprisonment. R. 2-10, 173-175, Tr. Trial 764-66.[1].

---

[1]. As the twenty (20) volumes of the 1,850 page transcript of the evidence are not consecutively numbered (but divided into the five (5) stages of the proceedings) references herein to the transcript (abbreviated "Tr.") will also identify the pertinent state (e.g. Tr. Trial, Tr. Sentencing Hearing, etc.). References to the technical record (abbreviated "R.") describe the proceedings before the trial court. References to the appellate record will identify the specific document as styled below (e.g. Appellant's Brief, Petition to Rehear, etc.).

Pursuant to Tenn. Code Ann. §39-2404(a) (1977), the sentencing hearing was conducted before the same jury on the 20th day of January, 1981 (the prosecution elected not to present proof of aggravating circumstances, arguing that the existence of such circumstances were already of record). Tr. Sentencing Hearing, 4, 9. The prosecution argued that they had already shown "that the defendant knowingly created a great risk of death to two (2) or more persons other than the murder victim"; "that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the petitioner or another"; and "that the murder was committed while the defendant was engaged in committing a robbery." Tr. Sentencing Hearing 7-8. See Tenn. Code Ann. §39-2404(i) (1977). The defense relied upon the statutory mitigating circumstances of the petitioner's youth and the absence of a significant prior criminal history, but also attempted to show the existence of two (2) other mitigating factors --- that the defendant's death would not benefit society and that his death would not comply with moral and ethical standards of conduct. Tr. Sentencing Hearing 10. See Tenn. Code Ann. §39-2404(j) (1977).

The jury soon returned to sentence the petitioner to death upon each of the three (3) convictions of murder in the first degree. Upon the count of the indictment involving the death of the child, they found all three (3) aggravating circumstances suggested by the prosecution. Upon the two (2) counts involving the death of the persons seated in the taxicab, the jury found, as aggravation, that the murders were committed for "the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution." Upon each count, the jury also found that there were no mitigating circumstances "sufficiently

substantial to outweigh" the statutory aggravating circumstances. Tr. Sentencing Hearing 126-27. The trial judge approved and adopted the verdicts, setting execution for May 20, 1981. Tr. Sentencing Hearing 129-30.

Petitioner filed a timely motion for a new trial with appended affidavits and, on the 9th day of March, the motion was heard upon the receipt of further testimony. Tr. Post-Trial, in general. A written order overruled the motion (A.E) and a timely appeal was perfected with an interim stay of execution. The direct appeal as of right was argued before the Supreme Court of Tennessee, which has exclusive jurisdiction of death-penalty appeals (see Tenn. Code Ann. §39-2406(a) (1977) and Tenn. R. Crim. P. 3(b)), on the 9th day of February, 1982. That court filed an opinion, which is wholly adverse to petitioner, on the 3rd day of May, 1982. A.A. The defense filed a petition to rehear on the 13th day of May and it was summarily denied on May 21st, 1982. A.B.

B. What facts are material to the questions presented for review?

The crime, itself, is well-described in the opinion of the Supreme Court of Tennessee. A.A. 2-4. As to the proof of petitioner's guilt, both survivors of the robbery identified the petitioner at trial as the assailant, although both had acknowledged exposure to extensive pretrial publicity featuring film and photographs of the defendant. Tr. Trial 52-53, 74-75, 93, 166-68.

The petitioner was also "identified" by a young woman, who contended that she had entered the market as a customer in the midst of the crime. Tr. Trial 280-87. Immediately recognizing both that a robbery was in progress and that Cecil Johnson (whom she claimed to have met) was the readily-

apparent robber, she testified that she calmly went to the rear of the market, selected some soft drinks, paid for her purchases at the counter where the three (3) victims and the robber were crowded, drove home to casually remark of the transpiring events to her loved ones, and first told police of the bizzarre experience nine (9) days after the petitioner's arrest. Tr. Trial 280-321.

Upon his voluntary surrender to the police on the day after the crime, Cecil Johnson had not made any inculpatory statements and claimed to have been elsewhere at the time of the episode. The murder weapon was never recovered, no proceeds of the robbery were found, no fingerprints were identified, no bloodstains were found on the defendant's clothes, and no physical evidence directly linked Cecil Johnson to the commission of the crime. Thus, the prosecution's proof originally rested solely upon the eyewitness identifications.

The petitioner defended by presenting an alibi, which was independently corroborated in a manner leaving only moments during which he could have committed the crime.[2] Denying any involvement, Cecil Johnson testified that, during this brief period, he was riding in an automobile driven by a casual acquaintance in route to his father's home, which was near the scene of the crime. Tr. Trial 470, 481-82.

When arrested, Johnson couldn't initially recall his acquaintance's name for either police investigators or his court-appointed defense attorney (Tr. Trial 492), but

---

2. The precise time of the commission of the crime was closely explored by the defense at trial with contradictory estimates. See Appellant's Brief 46-50, 107-111. By their failure to cross-examine certain alibi witnesses and by their statements in closing argument, the prosecution appeared to concede at trial that Cecil Johnson was 29 minutes from the scene of the crime at 9:25 P.M., or later, and safely in his father's home at 10:00 P.M. See Appellant's Brief 108, n. 10. Thus, even the prosecution's theory of the case would leave only a few moments during which the petitioner could have accomplished the double-robbery and triple-murder, making good his escape.

investigators identified and found the man on the next day. Tr. Trial 347. He immediately corroborated Johnson's claim of absence from the scene of the crime, giving a twenty-five (25) page written statement to the defense and a twenty-seven (27) page typed account to the District Attorney's Office in interviews separated by only a few hours. Tr. Trial 391-94. Accompanying defense investigators to the nearby town he and Johnson had visited on the night of the crime, the witness retraced their movements and knocked on doors in a successful effort to discover other witnesses who could corroborate the emergent alibi. Tr. Trial 343, 347, 370-71. He met with Johnson's attorneys and defense investigators on numerous occasions, receiving them into his home. Tr. Trial 369-70, 389. Johnson's attorneys filed a notice of intent to rely upon an alibi defense, named the witness in their pleading, and caused a subpoena to issue for his testimony at trial. R. 36.

From July 6, 1980 until January 10, 1981, this critical witness continued to assist the defense in preparation for trial to begin on January 13th. In the weeks before trial, the prosecutors decided the witness' anticipated alibi testimony would be false and determined that he must also have been involved in the robbery-murder, although they admittedly had no proof of his guilt. Tr. Trial 597-98. Developing a "need to talk to" the witness (Tr. Post-Trial 72), they sought him through his retained counsel and bondsman, both of whom served the witness on an unrelated, pending burglary charge. Tr. Trial 339, 381, Tr. Post-Trial 72, 76. The witness' counsel was told by the prosecutor "that anytime that he was able to find him, whether morning, noon, or night, no matter what time, I would, I wanted to talk to him," but his offer was not successful in securing the cooperation of the defense witness. Tr. Post-Trial 73, 86.

On January 8th, the prosecutor told a police detective of his "need" to speak with the witness and the detective apparently understood the conversation as an instruction to produce the man.[3] Tr. Post-Trial 56, 62, 73. The detective passed the message to a patrolman assigned to the witness' neighborhood and, on the same evening, the patrolman successfully detained the witness after searching for him. Tr. Post-Trial 38, 40, 50-51. Although the patrolman testified that he had stopped the man for suspicion of planning a robbery and "arrested" the witness for the misdemeanors of public drunkeness and carrying a weapon for the purposes of going armed, the witness was not "booked" on the charge, was not committed to jail, was never released from custody on judicial authority, and was never prosecuted on the charges. Tr. Post-Trial 46-49, 54, 69-71. Instead, at 1:00 A.M. on January 9th, the witness was escorted into a locked and darkened courthouse by the detective, a prosecution investigator, the elected District Attorney General, and two (2) assistant prosecutors. Tr. Post-Trial 57, 66, 68. When the detective drove the witness back to his home at 4:00 A.M., he had recanted his alibi testimony. Tr. Post-Trial 69-70.

The witness, who had earlier been drinking and smoking "a little" marijuana, "told the same story" for the first hour and one-half until the District Attorney General instructed the detective, "well, it looks like we are not getting anywhere so we will just go on and take him back across the street" to where the police booking room and county jail are located.

---

3. In the post-trial evidentiary proceedings, the detective responded "I can't answer that" when asked if it was his intention to arrest the witness on sight. When asked what he would have done if tht witness had politely refused the offer of escorted transportation to the Office of the District Attorney General, the detective answered "I don't know." Tr. Post-Trial 63.

Tr. Post-Trial 59. Tr. Trial 429. Although the witness had promptly requested the presence of his retained counsel, a prosecutor promised that the interrogation would avoid his pending burglary charge or his "arrest" of that evening, a representation which led the witness to withdraw his request for legal assistance. Tr. Trial 381-82, Tr. Post-Trial 76. However, the prospect of the witness being indicted, or "leaving himself open to be indicted, at some point in time" upon the same murder and robbery charges then pending against Cecil Johnson "did come up on more than one occasion", the prosecutors admitted. Tr. Post-Trial 81-83. The witness apparently understood this prospect, explaining "they said I was going to be convicted . . . I have been hearing that all the time." Tr. Trial 384. When asked why he recanted his alibi testimony at four o'clock that morning, the nineteen (19) year old witness replied "I was scared, you know, I was scared, but that was just it." Tr. Trial 336, 386.

After he recanted and on the day before trial, the witness and his counsel returned to the Office of the District Attorney General to preserve his newly-revised account in a written statement upon a promise of immunity should he be called to testify. Tr. Trial 366. The witness understood his "immunity" ("I can't hardly pronounce the word") to mean that he wasn't going to be charged with anything at all in reference to the market robbery and resulting murders if he testified for the State of Tennessee against Cecil Johnson, rather than as a witness for his defense. Tr. Trial 387-89.

Called to the stand to close the prosecution's case-in-chief at trial, the witness told the jury that Johnson had been in possession of a "dark" gun on the day of the killings and had earlier planned to rob a fried chicken outlet, if it had been open. Tr. Trial 347-349. Exiting the car near the

scene, Cecil Johnson, the witness claimed, said "he was going to rob Bob Bell (the market owner)" and "he said he was going to try to leave no witnesses." Tr. Trial 353. Meeting Johnson after the crime, the witness told the jury that he had received a portion of the cash proceeds of the robbery, retrieved the murder weapon from where Johnson had flung it into the low grass of a front yard near his father's home, and heard Johnson say "I didn't mean to shoot that boy." Tr. Trial 357-60, 416-418. The next morning, the witness said that he sold the pistol to a stranger, who was the first person he asked about buying the gun. Tr. Trial 419-21.

Admitting his previous inconsistent statements during cross-examination, the witness acknowledged that he had long insisted on Johnson's innocence and complete alibi, but recently changed his account. Tr. Trial 369-70, 389-94. Asked to reconcile the two (2) versions, the young witness twice told the jury "I told the truth then" in references to his original recollections of the alibi and insisted "I didn't tell no lies." Tr. Trial 352, 372-73. Upon this proof, the petitioner was convicted of three (3) counts of murder in the first degree, as well as sentenced to the maximum terms upon the other four (4) felony charges.

In opening statement upon the sentencing hearing, the District Attorney General speculated that there were only two (2) mitigating circumstances that he could conceive as pertinent to the petitioner --- that there was no significant history of prior criminal activities and that the defendant was young at the time of the commission of the crime. Tr. Sentencing Hearing 8. He advised the jury to reject the absence of a prior criminal record" in view of the enormity of the crime committed here" and volunteered his opinion that twenty-three (23) years of age wasn't "so youthful. I have assumed that that meant to apply to some juvenile or

very young defendant." Tr. Sentencing Hearing 8-9. The issue of the petitioner's youth as a mitigating circumstance was fully joined when defense counsel, in his opening statement, admitted reliance upon this factor, amongst others. Tr. Sentencing Hearing 10.

Petitioner presented testimony from his father and younger sister, both of whom described Cecil Johnson's childhood, teenage years, and early adulthood. Tr. Sentencing Hearing 19-33. They told of his mother's departure "to find a different life" when Cecil was five (5) years old and the resulting division of the eleven (11) children into three (3) groups, with only Cecil remaining with his father. Tr. Sentencing Hearing 21-22, 31. Dropping out of school at age fourteen (14) with hope of money and career, they recited a variety of jobs Cecil had held and his satisfaction with the hospital employment occupying him at the time of his arrest. Tr. Sentencing Hearing 22-25. His father recalled the extraordinary pride with which Cecil had constantly worn the hospital uniform as a public badge of his employment. Tr. Sentencing Hearing 24-25.

Later during the sentencing hearing, petitioner attempted to follow his family's evidence with the testimony of Dr. Thomas Wayne Ogletree, professor of theological ethics at Vanderbilt University Divinity School and a fellow in the Institute of Public Policy Studies. Tr. Sentencing Hearing 75-76. With unusual qualifications in his field, the trial court acknowledged his expertise and the jury heard the professor's definition of ethics. Tr. Sentencing Hearing 77. "For example," he stated, "in relationship to the crime which is presently before us . . . ," whereupon the prosecution objected upon unstated grounds and the jury was excused. Ibid. In their absence, Ogletree continued to explain that the death penalty involved the most elemental principle in western moral thought (i.e. that we do not harm others), but

that three (3) moral positions might be used to override that fundamental principle (absolute necessity to protect the lives of others, deterence of other persons from committing similar crimes, and, third, that the person deserves to die). Tr. Sentencing Hearing 79-83. Rejecting the first justification as inapplicable to this case and the second as morally unacceptable, he found a moral basis for the third position, which requires a conclusion that the person had full control of his life and was sufficiently master of himself that we could know beyond a reasonable doubt that he is fully accountable for what he has done. Tr. Sentencing Hearing 82-83.

Dr. Ogletree thought the age of the defendant to be significant from an ethical standpoint as research showed that most of us only began to develop the capability of independent moral judgment in our late teens and early adulthood. In principle, he said, it is impossible for a person of twenty-three (23) years of age to achieve that kind of genuine moral maturity that equates moral accountability. Tr. Sentencing Hearing 83-85. On cross-examination, the expert agreed that he had never talked to Cecil Johnson and could not presume to judge whether he had this emotional maturity, a decision which he viewed as a matter for the jury. Tr. Sentencing Hearing 86. Upon the prosecutor's claim that "all this is objectionable", the trial court sustained the protest and instructed the witness to stand down before returning the jury to the box. Ibid. Later, the trial judge interjected that he had sustained the blanket objection as the testimony had no probative value on the issue of punishment. Tr. Sentencing Hearing 88. Soon, the jury returned sentences of death upon each of the three (3) convictions of murder in the first degree. Tr. Sentencing Hearing 119-28.

C. How were the federal questions raised in the Court's below?

1. The federal questions concerning the prosecution's interference with the critical alibi witness were raised upon first discovery of the factual circumstances.

No pretrial objection was made to the State's treatment of the petitioner's critical alibi witness for the obvious reason that tht factual circumstances of his capture and interrogation were first revealed during his examination at trial (Tr. Trial 335-437) with further details being elicited during a post-trial evidentiary hearing. Tr. Post-Trial 36-90.

Within two (2) weeks of the crime (on July 17th, 1980), the prosecution had interrogated the witness resulting in a lengthy statement which wholly supported the petitioner's alibi. Tr. Trial 391-92, 580. Pursuant to Tennessee reciprocal discovery procedures, the defense officially notified the prosecution in November, 1980 of an intent to rely upon a defense of alibi by calling the witness, who was identified in the pleading by name and address. R. 36-37. The prosecution did not intercept the witness and induce his recantation of the anticipated alibi testimony until seventy-two (72) hours before the start of the trial (Tr. Trial 350-51) and the defense was first notified of the witness' possible prosecution testimony on the day before trial. Thus, no pretrial objections were possible in response to these last-minute developments.

Upon motion for a new trial, petitioner complained that these procedures denied "his right to a fair trial conducted in compliance with due process requirements and . . . hindered tht effectiveness of his counsel in preparing and presenting his defense." A.F-1. After a post-trial evidentiary hearing, the trial judge approved of the State's conduct and concluded "these matters address themselves primarily to the rights

of (the witness) . . . this Court doubts that the defendant has standing to complain of alleged violations of (the witness') rights." A.E-1.

On direct appeal, petitioner repeated this complaint as the first (1st) of three (3) propositions in support of his relief. Appellant's Brief 78-111. After citing seven (7) errors in the prosecution's treatment of his subpoenaed, alibi witness, petitioner argued that he had "constitutionally-protected rights to present a defense, to offer the testimony of witnesses, to compel their attendance, to prepare for trial through his counsel's investigation of the facts, and to confer with his witnesses without substantial interference." Appellant's Brief 92. Thus, he argued, his constitutional protections as a defendant extended over his critical witness "as he was escorted into a darkened courthouse at midnight seventy-two (72) hours before the trial began." Ibid. Citing cases from this Court supportive of his Sixth Amendment right to compulsory process and his Fourteenth Amendment due process rights to present his own witness to establish a defense (Appellant's Brief 93-95), petitioner argued that his witness' recantation had been unconstitutionally obtained and illegally presented with ultimate impact upon the verdicts. A.B-98.

The Supreme Court of Tennessee noted this argument in their opinion, although they construed it as an assertion that the prosecutorial actions had violated the witness' Fourth, Fifth and Sixth Amendment rights."[4] A.A-7 (see Petition for Rehearing 2-6). In this context, the appellate

---

[4] The reported opinion's use of this phrase apparently reflects a misunderstanding of the legal significance of petitioner's argument for his brief does not even refer to the Fourth and Fifth Amendments and cites the Sixth and Fourteenth Amendment only in support of petitioner's independent rights. See Appellant's Brief 7, 93-94, 96 and Appellant's Petition for Rehearing 3.

court below found "no basis for the argument, either in fact or law," finding nothing in the record to show a violation of the witness' constitutional rights. A.A-8. Further, the court found that, even if the witness' rights had been violated by the prosecution, "these rights are personal to (the witness) and can only be asserted by him and not by some other person, such as appellant, who might be adversely affected by information elicited during the detention and interrogation (citing cases)." A.A 8-9.

Thus, the issue was raised at the earliest opportunity in the trial court, argued upon direct appeal, and addressed by the appellate opinion, even if the simple resolution misapprehended the point of petitioner's admittedly-complex argument.

2. The other complaints of prosecutorial misconduct were raised in various manners and argued to have accumulated with the witness intimidation to deny a fair trial complying with due process.

Petitioner concedes that his other five (5) complaints of prosecutorial misconduct are lesser in their individual scope and did not initially raise independent federal questions of a nature normally addressed by this Court in the exercise of its discretionary jurisdiction. However, petitioner argues, as he did below, that the magnitude of the issues surrounding the intimidation of his sole corroborative witness give an expanded significance to all other episodes of prosecutorial misconduct in a determination of whether the cumulative effect of the State's actions denied a trial complying with due process. That is, the sum of his lesser complaints reaches the magnitude of a federal question.

The first of these matters concerns declarative statements made by the prosecutor in the purported context of questions

during the direct examination of the petitioner's former alibi witness. The questions included a request for the witness to repeat certain out-of-court statements made by the prosecutor on the announced theory that it was relevant for the jury "to know that I (a prosecutor) didn't do anything to make him (the witness) tell me this." Tr. Trial 351. A contemporaneous initial objection was denied, a second objection was later sustained without a jury instruction to disregard the commentary, and a third episode of such questioning passed without interruption. Tr. Trial 351-52, 366. The matter was raised in the motion for a new trial (A.F-2-3) and the trial judge's response seems to acknowledge that the questions were improper, although he opined cured by the final instructions to the jury. A.E-2. Incorporated as a portion of the petitioner's cumulative complaint of misconduct upon appeal (Appellant's Brief 84-85), the Supreme Court of Tennessee found "no basis for the charge" when the matter was reviewed as an independent and self-sufficient allegation of error. A.A-9.

In closing argument, a prosecutor told the jury of his early opinion of the veracity of the intended alibi his anticipation of perjury in presentation of the alibi, his intent for the jury to benefit from "every piece, everything we know about this case," and his inability to find proof of the witness' complicity in the crime as his inspiration to seek out the defense witness to demand the "truth". Tr. Trial 597-98. Although the testimonial remarks were not subject to a contemporaneous objection, the issue was raised upon appeal as a component of the cumulative error (A.B 86-87) and the appellate court again found "no basis for the charge." A.A-9.

During his closing rebuttal argument, the District Attorney General told the jury of matters not in the record concerning his personal interest and motivation in the

prosecution, owing to his own daughter's school attendance with the youngest murder victim. Tr. Trial 674. He continued "it could have been my little girl that was in that store, a witness eliminated. It could have been you. It could have been your children. It could have been anyone of us, if we decided that we wanted to buy something from Bob Bell (the murder victim's father and market-owner) at 9:58 on July 5, 1980 we would have been dead." Ibid. Contemporaneous objection was not made, but the matter was highlighted in the motion for a new trial. A.F-3. The trial judge concurred that the comments were improper and admitted considering a curative instruction sua sponte, but he rejected the action in the opinion that, amongst other reasons, the proof of the defendant's guilt was so overwhelming that the remarks could have no effect on the jury's verdict. A.E-2-3. Further, he found "no errors in the record sufficiently sufficient to combine with the improper statement to produce a 'cumulative effect.'" Ibid. Despite this opinion, the impropriety was included in the petitioner's cumulative-effect argument upon appeal (Appellant's Brief 99-102), although the Supreme Court of Tennessee failed to address the issue even when its omission was emphasized in the petition for a rehearing. 6-7.

Fourth, the prosecution knowingly and intentionally withheld notice to the defense of the existence of an alleged eyewitness to the crime from July 15th, 1980 until January 2nd, 1981 (eleven days before the trial began). Tr. Trial 284-86. Tr. Post-Trial 87-90. This concealment occurred although the petitioner had filed a specific request for such discovery in September, 1980, recieved an immediate answer omitting notice of the existence of the witness, and theoretically benafited from an October 17th order granting his request for discovery. The petitioner complained of this neglect in his motion for a new trial (A.F-4) and the

trial judge responded that the matter was a "mere inadvertence." A.E-3. The problem was introduced on appeal as evidence of the cumulative effects of prosecutorial improprieties. Appellant's Brief 102-107. The Tennessee Supreme Court responded that the petitioner's complaint was tardy, that the notice had been provided within one (1) day of the minimum period required by the procedural rules, and that the trial record did not indicate that the failure of notice hindered the defense. A.A-10.

Finally, the prosecutor had triggered reciprocal discovery by filing a motion for notice of alibi, specifying the exact time of the offense in their September, 1980 pleading. R. 15. Yet, during the January trial, the prosecution called seven (7) witnesses who testified that the offense had been completed before the time specified in their earlier notice. See Appellant's Brief 46-50. While such a variance would not normally be of extraordinary significance, the alibi, as the prosecution was well aware, placed the petitioner in transit near the scene of the crime and in the sole company of his recanting witness at the earlier hour. Thus, the alteration in the time of the offense forced the petitioner to rely upon his intimidated witness, without benefit of independent corrobative witnesses available to establish his whereabouts at earlier and later times. Much of the testimony at trial focused upon the precise hour of the commission of the crime (see Appellant's Brief 46-50) and the misleading notice was cited in the motion for a new trial. A.F-4-5. The trial judge found this, too, to be a "mere inadvertance" without prejudice to the petitioner's rights and concluded that the prosecutor had "conducted both the investigation and the trial in a commendable manner, and in good faith as is inherent in his responsibility." A.E-3. Petitioner addressed the point as an additional episode of misconduct in his appeal (Appellant's Brief 107-111) and the

Tennessee Supreme Court ruled that "how he was prejudiced is not clear." A.A-10.

These five (5) assertions of misconduct were raised by the petitioner in his direct appeal in a single proposition, which also incorporated his complaints concerning the intimidation of his alibi witness, as follows: Did prosecutorial improprieties have a cumulative effect denying tht defendant's right to a fair trial complying with due process and hindering the effectiveness of his counsel in preparing and conducting the defense? A.B-9. Although the Supreme Court of Tennessee did not evaluate the incidents in the cumulative context urged by the petitioner, but simply disposed of each claim on its independent merit, the record establishes that the federal question was raised by the accumulation of these errors, each resulting from prosecutorial conduct. Petitioner has never claimed that the five (5) episodes each raise federal questions of independent vitality, but continues to argue that their accumulation resulted in a trial inconsistent with due process protections.

3. The federal constitutional issues as to the admissibility of general expert testimony upon mitigating circumstances at the sentencing hearing arose and were preserved at trial.

In the second (2nd) of the two (2) major questions which petitioner presents for review by this Court, he complains of tht trial court's exclusion of an expert witness, who would have testified as to the relationship between the petitioner's age and the accountability of youth for moral decision-making. Tr. Sentencing Hearing 75-88. The exclusion was based upon the trial judge's opinion that the tendered proof had "no probative value on the issue of punishment" and followed the opening statements of counsel during the

sentencing hearing, when both sides argued as to whether the petitioner could justly claim his age as qualifying under the statutory mitigation of "youth". Tr. Sentencing Hearing 9-10, 86-88.

The exclusion of the witness was protested by the defense, but the trial judge had already established his attitude upon the admission of mitigating evidence when he ruled upon the prosecutor's protest to the relevancy of defense witness who appeared earlier during the sentencing hearing. Citing cases from this Court and the Tennessee Supreme Court, the defense had orally argued that the petitioner was entitled to broad lattitude in the admission of potentially mitigating evidence and the trial judge had cited Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978) for the proposition that the Eight and Fourteenth Amendments required "a broad latitude, a mighty broad latitude." Tr. Sentencing Hearing 45-48, 57-62. The trial court had then admitted portions of the first witness' intended testimony, but excluded any testimony from the second witness, after a jury-out proceeding apparently convinced him that the evidence lacked any probative value. Thus, the federal constitutional issue as to the admission of testimony from the second witness had been raised before the expert even took the stand.

This exclusion was raised by the motion for new trial (A.F-7-8) and the trial judge responded that the expert had sought to tender an opinion "upon a subject which was within the grasp of ordinary men -- therefore, making the opinion unnecessary --- the Jury could navigate without it. Moreoever, the opinion was not predicated upon any fact proved on the trial, nor was it based on any examination of or conversation with the defendant." A.E-5. On appeal, petitioner argued that the evidentiary ruling deprived the jury of guidance needed to evaluate the defendant's mitigating circumstances and resulted in an arbitrary and capricious sentence of death.

Appellant's Brief 111-120. The Supreme Court of Tennessee opined that the pertinent Tennessee statute (Tenn. Code Ann. §39-2404(c) (1977) went even further than Lockett v. Ohio, supra, required, but held that the tendered evidence "was not relevant to, nor did it have any probative value on the issue of punishment, but consisted of matters properly to be considered by the legislature in deciding whether the death penalty is ever a justified punishment for a person convicted of murder in the first degree and, if so, the circumstances under which the death penalty should be imposed." A.A-11-13. On petition to reconsider, Cecil Johnson stressed the materiality of the testimony without success. 7-9.

REASONS SUPPORTING THE GRANT OF THE WRIT

I. As the opinions below erroneously rejected petitioner's constitutional complaints as an improper attempt to assert a defense witness' personal rights as an extension of a defendant's protections, this petition should be granted to provide a first opportunity to address the petitioner's due process claims.

As more fully described above in the Statement of the Case (§C - How the federal questions were raised in the courts below?), both the trial and appellate courts either misconstrued or neglected the petitioner's repeated claim that prosecutorial interference with his critical, alibi witness violated his due process right, as a criminal defendant, to present a defense. Both courts interpreted the petitioner's arguments as an attempt to extend or expand his constitutional protections through simple reliance upon the personal rights of a third-party witness.[5] See Petition to Rehear 2-6.

---

[5] The trial judge held that the District Attorney General had a "sworn duty" to obtain the "true statement" of the critical defense witness and added "Moreover, this Court doubts that the defendant has standing to complain of alleged violations of (the witness') rights." A.E-1. The Tennessee Supreme Court found, first, that nothing in the record showed a violation of the witness' constitutional rights. Second, they held that, even if the witness' rights had been violated by law enforcement officials, "these rights are personal to (the witness) and can only be asserted by him and not by some other person, such as appellant, who might be adversely affected . . . " A.A-8 (emphasis added).

If the courts below had correctly analyzed the facts and the applicable law, petitioner could not be heard to complain of their conclusion as the result of such reasoning. Petitioner is well aware that substantial authority from this Court prohibits a defendant from hiding within the Fourth Amendment protections of another. Petitioner does not challenge the courts below upon their statement of a general proposition of law, but respectfully contends that their opinions misapprehend the crux of his argument.

Petitioner has repeatedly asserted that his claims are soundly based upon his Sixth Amendment right to compulsory process and his Fourteenth Amendment right to present a defense within the protections of due process of law. Washington v. Texas, 388 U.S. 14, 18 S. Ct. 1920, 18 L. Ed.2d 1019 (1967), and Webb v. Texas, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed.2d 330 (1972), both of which opinions are discussed below, clearly establish the petitioner's standing to make such a contention. Yet, the courts below neglected this well-established theory to rule adversely in reliance upon a different constitutional standard, which petitioner had never argued.

As tht questions presented for review by this Court are of constitutional significance and as these issues have never been addressed in the history of these proceedings, this Court should grant the petition and, thereby, provide a first opportunity to examine these due process claims.

II. Webb v. Texas and Washington v. Texas should be re-examined to define the extent to which their constitutional parameters include a defendant's due process rights to protect his preparation and presentation of a defense from prosecutorial interference.

Noting the great disparity between the posture of a presiding judge and a prison inmate called as the sole defense witness, this Court concluded that the unnecessarily strong terms used by the judge "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." Webb v. Texas, 409 U.S. 95, 98, 93 S. Ct. 351, 34 L. Ed.2d 330 (1972). Reversing the conviction which followed the witness' refusal to testify. Webb held that the remarks "effectively drove the witness off the stand and thus deprived (Webb) of due process of law under the Fourteenth Amendment." Ibid. Although this duress was directed at a witness, the conduct deprived the defendant of his right to due process of law.

Webb cited the authority of Washington v. Texas, 388 U.S. 14, 18 S. Ct. 1920, 18 L. Ed.2d 1019 (1967), which held unconstitutional a statute prohibiting co-participants in a crime from testifying for one another (although either could testify for the state). 388 U.S. 17. Applying the Sixth Amendment right to compulsory process, this Court held that "the right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . This right is a fundamental element of due process of law." Washington v. Texas, supra, 388 U.S. 18-19.

Both Webb v. Texas and Washington v. Texas have been extensively cited as general support for "the right to present a defense" and for the relationship between compulsory process and due process. Yet, both opinions present somewhat unique facts and only a rare case would squarely present a closely-analagous factual circumstance.

Webb and Washington were held by the Fifth Circuit Court of Appeals to control and require remand of a situation in which an FBI agent's suggestion that "trouble" in another jurisdiction would result if a defense witness "continued on" in his testimony and in which all defense witnesses were subpoenaed during the trial to appear before a grand jury for further investigation of the matter. United States v. Hammond, 598 F.2d 1008, 1012 (1979) (On Rehearing, 605 F.2d 862). The defense witnesses then refused to testify, although their anticipated evidence was stipulated, and the appellate court found substantial government interference with a defense witness' free and unhampered choice to testify in violation of the defendant's due process rights. Ibid.

Before Webb, the Fourth Circuit Court of Appeals had cited Washington v. Texas in support of the habeas corpus reversal of a conviction following the prosecutor's arrest (upon long-dorment, but related charges) of a subpoenaed defense witness, whose testimony might have mitigated the defendant's punishment. Bray v. Peyton, 429 F.2d 500, 501-02 (1970). More recently, both Webb and Washington were relied upon to grant a habeas corpus petition based on a trial judge's weekend detention of a testifying defense witness, who recanted on the witness stand after the trial judge had threatened to revoke his probation and charge him with perjury if his testimony was not truthful and consistent with his prior sworn testimony. Berg v. Morris, 483 F. Supp. 179, 181-83 (E.D. Cal. 1980). See, also, United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976), United States v. Thomas, 488 F.2d 334 (6th Cir. 1973), and United States v. Harlin, 539 F.2d 679 (9th Cir. 1976), cert. den. 429 U.S. 742.

Despite the frequence general reliance on Webb and Washington, petitioner respectfully suggests that subsequent experience in the strict application of these authorities is somewhat episodal in that the case-made list of prohibited

practices grows slowly without clear constraint of future misconduct. Petitioner reads Webb and Washington as widely-sweeping decisions that should serve as explicit limitations on both judicial and prosecutorial interference with a defendant's preparation and presentation of his defense. Yet, the evolving case law has not provided such guidance, as is evident from the opinions below in this case which ignore these precedents.

Thus, petitioner urges re-examination of the parameters of Webb and Washington and suggests that this petition should be granted as an unique opportunity to clarify the extent to which the Fourteenth Amendment protects the preparation and presentation of a defense from prosecutorial interference.

III. This petition should be granted as the opinions below conflict with the decisions of this Court, federal courts of appeal, and another state court of last resort.

By reason of their complete failure to address the petitioner's claim of a violation of his due process right to present a defense while protected from prosecutorial interference, see §I above, petitioner asserts that the opinions of the courts below are in direct conflict with decisions of this Court in Washington v. Texas, supra at §II, and Webb v. Texas, supra at §II. It follows that the opinions below also conflict with decisions of the various federal courts of appeal which have construed Washington and Webb. See the cases cited in §II, including United States v. Hammond, Bray v. Peyton, United States v. Morrison, United States v. Thomas, and United States v. Harlin, all supra. See, generally, Annot. "Interference by Prosecution with Defense Counsel's Pretrial Interrogation of Witnesses," 90 ALR3d 1231.

Further, the opinions below also conflict with the en banc decision of the Supreme Court of the State of Washington in

Washington v. Burri, 550 P.2d 507 (1976). Burri, a larceny defendant, had filed a notice of alibi providing the prosecutor with the names, address and telephone numbers of six (6) alibi witnesses and had helpfully enclosed written statements by four (4) of the intended witnesses. Supra at 509. Under the apparent authority of a state statute authorizing sworn testimony in an ex parte "special inquiry hearing," the prosecutor summoned the six (6) defense witness, questioned each concerning the alibi, and excused them with instructions not to discuss their testimony with any other person. Supra at 509-10. The defense succeeded before the trial court in dismissing the indictment for this interference, although the prosecutor claimed that his intention was to investigate a separate crime --- a suspected conspiracy between the defendant and his witnesses to fabricate a perjured alibi. Ibid.

Upon the prosecutor's appeal, the Supreme Court of Washington upheld the dismissal in that the procedure violated the defendant's protected right to a fair trial, which right contemplates that the defendant will not be prejudiced by the denial of his right to counsel and compulsory attendance of witnesses. Burri, supra at 510-11. The prosecutor had tendered a transcript of the hearing to the defense, limited his instruction of silence to the specific testimony at the hearing, and put the witnesses at liberty to discuss their alibi testimony with the defense, so long as they avoided the subject of the hearing. Supra at 509. Although the record did not show "the extent of the prejudicial inhibitary effect of the prosecutor's action upon the witnesses," the Washington Supreme Court held that a defendant is denied his right to counsel if the actions of the prosecution deny the defense attorney an opportunity to prepare for trial, which includes a full investigation of the facts and the right to confer with

one's own witnesses. Supra at 511-13. Burri can not be factually distinguished from petitioner's circumstances because the procedure was conducted pursuant to an unusual statute as the statute was held to have been violated upon the authority of another case decided while Burri was on appeal and the opinion does not accuse the prosecutor of bad faith in assembling the inquiry. Supra at 510.

Petitioner brought Washington v. Burri to the attention of the Tennessee Supreme Court in his appellate brief (95-99) and in his oral argument, but the conflicting authority of another state court of last resort was apparently ignored or neglected.

Because of these conflicts with other controlling and persuasive decisions, which variances may be partially attributed to the failure of the courts below to address petitioner's constitutional claims, petitioner urges this Court to grant the petition to clarify the law and to enforce the mandates of its prior decisions.

IV. Granting this petition would permit this Court to better define how due process of law affects the evidentiary standards governing the relevancy and probative value of excluded testimony directed at a recognized mitigating circumstance at issue in a death-penalty sentencing hearing.

As the penalty of death is qualitatively different from any other punishment, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976), this Court has held that consideration of relevant facets of the character and record of the individual offender, as well as the circumstances of the particular offense, is constitutionally required in capital sentencing. Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954 (1978). However, footnote 12 in the Lockett decision explained that

the opinion was not intended to limit the traditional authority of trial courts to exclude, as irrelevant, evidence not bearing on the defendant's character. Supra at 605. See the opinion below, A.A-12.

Although Cecil Johnson contended that the tendered testimony of his expert witness, Dr. Thomas Ogletree, bore upon his character by providing a structure within which the jury could have weighed the evidence of his family concerning his youth and moral maturity, the trial judge excluded the proof as lacking probative value on the issue of punishment, a ruling endorsed by Tennessee Supreme Court. A.A-13. Tr. Sentencing Hearing 88. Both courts below cited the authority of Lockett before excluding the evidence. A.A-12. Tr. Sentencing Hearing 60.

This record clearly establishes that the petitioner's ability to claim his youth in mitigation of his sentence was at issue and it is equally clear that "youth" is a relevant consideration in capital sentencing. Tenn. Code Ann. §39-2404(j)(7) (1977). See, also, Eddings v. Oklahoma, ___U.S.___, 102 S. Ct. 869, 876 (1982). Neither the pertinent Tennessee statute, nor Eddings, limit the mitigating factor of "youth" to a chronological age, although the District Attorney General told the jury that he had always "assumed" the consideration to apply only to "some juvenile or very young defendant." Tr. Sentencing Hearing 8-9. Thus, it would seem that whether a defendant convicted of capital murder may mitigate his sentence by reference to his "youth" is a consideration solely within the province of the jury. Yet, the judicial exclusion of tendered evidence directed toward the lay jury's determination of the issue deprives them of information helpful to their weighty deliberations and substitutes a vague rule of evidence for their constitutionally-mandated judgment of the individual offender.

Petitioner respectfully suggests that this Court did not intend Lockett as a broad rule to exclude evidence and petitioner reads Eddings as support for his view. No substantial competing state interest was urged to overcome the petitioner's attempt to exercise his Sixth Amendment right to present exculpatory evidence. See Washington v. Texas, supra, Chambers v. Mississippi, 410 U.S. 284, 382, 92 S. Ct. 1038 (1973), and McMorris v. Israel, 643 F.2d 458, 460-61 (7th Cir. 1981).

As this Court has made clear the existence of a relationship between due process of law and the general evidentiary standards governing the relevancy of testimony at a capital sentencing hearing, petitioner urges that his petition be granted to better define both this relationship and the effect of constitutional mandates upon judicial exclusion of tendered mitigating evidence as lacking in probative value.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Tennessee.

Respectfully submitted,

ATTORNEYS FOR PETITIONER:

J. MICHAEL ENGLE*
Suite 100, 306 Gay Street
Nashville, Tennessee 37201
615/244-6583

ROBERT L. SMITH*
Suite 1000, Parkway Towers
Nashville, Tennessee 37219
615/244-4850

*While neither attorney is currently a member of the bar of this Court, both are eligible for admission and will submit their applications within five (5) days of the filing of this petition.

APPENDIX A:

Opinion of the Supreme Court of Tennessee

JUDGMENT ENTERED

DATE: MAY 3 1982
Ramsey Leathers, Clerk

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

RECOMMENDED FOR PUBLICATION

MAY 3 1982

STATE OF TENNESSEE,)
APPELLEE)
)
VS.)
)
CECIL C. JOHNSON, JR.,)
APPELLANT)

DAVIDSON CRIMINAL

DOCKET NO. 81-16-I

HONORABLE A. A. BIRCH, JR., JUDGE

For Appellant:
J. Michael Engle
Nashville, Tennessee

Robert L. Smith
Nashville, Tennessee

For Appellee:
Kymberly Lynn Anne Hattaway
Assistant Attorney General

William M. Leech, Jr.
Attorney General & Reporter
Nashville, Tennessee

AFFIRMED

COOPER, JUSTICE

O P I N I O N

This case is before us on direct appeal by Cecil C. Johnson, Jr., from a judgment entered in the Circuit Court of Davidson County, Tennessee. See T.C.A. § 39-2406. The judgment approved the jury's verdicts finding appellant guilty of three counts of murder in the first degree, two counts of assault with intent to commit murder in the first degree, and two counts of robbery accomplished with the use of a deadly weapon. The sentence imposed on each murder conviction was death by electrocution. Appellant also was sentenced to serve four consecutive life terms on the assault with intent to commit murder in the first degree and robbery convictions. On review, we find no material error in the trial record and affirm the several convictions.

The crimes for which appellant stands convicted were committed on July 5, 1980. There is evidence that on that day, at about 9:45 p.m., appellant went to the convenience market on Twelfth Avenue South in Nashville, Tennessee, which was owned and operated by Bob Bell, Jr. Appellant pointed a gun at Mr. Bell and ordered him and Lewis Smith, who was in the store working on a boat motor at the request of Mr. Bell, to go behind the store counter. Mr. Bell's twelve year old son, Bobbie Bell, was already behind the counter.

While appellant and his captives were behind the counter, a woman and two children entered the market.

Appellant concealed his gun and told his captives to act naturally and to wait on the customers. As soon as the customers left, appellant ordered Bobbie Bell to fill a bag with money from the cash register; Bobbie obeyed. Appellant then searched Smith and Bell, taking Smith's billfold.

At that moment, Charles House stepped into the market, and was ordered out by appellant; House obeyed. Almost immediately thereafter, appellant began shooting his captives. Bobbie Bell was shot first. Smith threw himself on top of Bobbie to protect him from further harm, and was himself shot in the throat and hand. Appellant then walked toward Bob Bell, who was on the floor behind the counter, pointed the gun at Bell's head and pulled the trigger. Fortunately, Bell threw up his hands and the bullet hit him in the wrist, breaking it. Appellant ran from the market.

Bell got a shotgun from under the store counter, preparatory to chasing appellant. He heard two gunshots outside the market. He looked toward the front of the store and saw appellant standing beside an automobile parked at the entrance. Bell chased after appellant. As he passed the automobile, he saw that a cab driver and his passenger had been shot. The passenger was later identified as Charles House, the customer who had entered the market only moments before appellant began shooting his captives and who was acquainted with appellant. Both the cab driver James E. Moore, and Mr. House died from a gunshot wound.

Appellant was arrested on July 6, 1980, as the result of information given police officers by Bell immediately after the robberies and murders. Subsequently, both Bell and Lewis Smith identified appellant as the perpetrator of the crimes and testified to that effect at the trial. Debra Ann Smith, the customer who came into the market with the children, also identified appellant and placed him behind the store counter with Bell, Bell's son, and Lewis Smith.

In addition to this eyewitness testimony, appellant was tied into the crimes by the testimony of Victor Davis, who had spent most of July 5, 1980, in company with the appellant. During the police investigation, Davis gave statements to the prosecution and to the defense that tended to provide an alibi for appellant. In essence, Davis said that he and appellant were together continuously from about 3:30 p.m. on July 5, 1980, until about midnight and that at no time did they go to Bell's Market. However, four days before the trial, and after his arrest for carrying a deadly weapon and for public drunkenness, Davis gave a statement to the prosecution, which incriminated appellant. In the trial Davis, who was promised immunity from prosecution in the Bell affair, testified in accord with his last statement.

According to Davis, he and appellant left Franklin, Tennessee, about 9:25 p.m. and arrived in Nashville in the vicinity of Bell's Market shortly before 10:00 p.m. Appellant then left Davis's automobile, after stating that he was going to rob Bell and was going to

try not to leave any witnesses.

Davis testified that he next saw appellant, some five minutes later, near appellant's father's house which was only a block or a block and a half from Bell's Market. At that time, appellant was carrying a sack and pistol. Appellant discarded the pistol as he got into Davis's automobile and said, "I didn't mean to shoot that boy." Davis retrieved the gun and sold it the next day for $40.00.

Davis further testified that after he picked up appellant, they went directly to appellant's father's house, arriving a little after 10:00 p.m. There, in the presence of Mr. Johnson, Sr., appellant took money from the sack, counted approximately $200.00, and gave $40.00 of it to Davis.

Appellant took the stand in his own behalf and denied being in the Bell Market on July 5, 1980. His testimony as to events of the day generally was in accord with Davis's testimony, except for the crucial minutes before 10:00 p.m. when witnesses placed appellant in Bell's Market. Appellant testified that he never left the Davis automobile on the trip from Franklin to his father's house in Nashville, and that he arrived at his father's house shortly before 10:00 p.m. Mr. Johnson, Sr., fixed the time of arrival of appellant at a few minutes before 10:00 p.m., by testifying that appellant arrived as a television program ended and the 10:00 p.m. news came on. Appellant's girl friend, who talked with appellant on the telephone while appellant was at his father's home, fixed the time as being ten

to fifteen minutes before 10:00 p.m. Appellant further testified that the money counted in the presence of his father was money he had won gambling in a street game in Franklin, Tennessee.

The jury accepted the prosecution evidence, including the identifications of appellant as the person who committed the robberies and murders, and found appellant guilty of murder in the first degree in killing Robert Bell III, James E. Moore, and Charles H. House, of assault with intent to commit murder in the first degree in the shooting of Lewis Smith and Robert Bell, Jr., and of the robbery of Smith and Bell.

The appellant does not specifically challenge the sufficiency of the convicting evidence, but does insist the prosecution was guilty of improprieties which had "a cumulative effect denying the [appellant's] right to a fair trial complying with due process and hindering the effectiveness of his counsel in preparing and conducting the defense." Under this general assignment, appellant insists the prosecution violated law and ethics in coverting the crucial alibi witness, Victor Davis, into a prosecution witness hostile to the defense.

The thread of appellant's argument throughout his brief of this assignment, and in his oral argument before this court, is that Davis was a "declared witness" for the defense; and that, having been so declared, the prosecution somehow was prohibited from questioning Davis and getting him to change his "story"--that, it was not fair to permit the defense to build an alibi

based on the initial statements given by Davis and then have the prosecution get Davis to change his story shortly before trial.

It is well settled that prospective witnesses are not partisans and do not belong to either party, but should be regarded as spokesmen for the facts as they see them. See Gammon v. State, 506 S.W.2d 188, 190 (Tenn. Crim. App. 1974). The purpose of an investigation and trial is to get to the truth. This sometimes entails the interrogation of witness on several occasions before truth is distilled in its purity. Neither party can have its investigation limited merely by a declaration that a witness will testify in behalf of the other party.

In addition to the general argument, appellant points to specific acts of the prosecution, which appellant insists were violative of both law and professional ethics. Appellant complains of the fact that the district attorney general caused Davis to be detained for questioning within a week of the trial date, the fact that Davis was questioned in the absence of his counsel, the time of day the questioning took place and Davis's physical condition, the fact that the prosecution made Davis aware of the possibility that the State would turn up evidence against Davis and move against him, and the ultimate grant of immunity to Davis from prosecution for crimes growing out of the Bell incident. Appellant argues that these actions by the district attorney general and his associates, violated Davis's Fourth, Fifth, and Sixth Amendment rights. We

see no basis for the argument, either in fact or law. First, we find nothing in the record to show a violation of Davis's constitutional rights. The evidence shows that Davis's detention was as the result of a lawful arrest on charges of public drunkenness and the unlawful possession of a deadly weapon. The record also shows that Davis knowingly and voluntarily waived his right to counsel when he learned that the interrogation would be limited to the Bell incident. On the Monday following the interrogation, Davis and his attorney went to the office of the district attorney general, where Davis repeated his statement in the presence of his counsel, had it reduced to writing, and signed it. Furthermore, when Davis testified in the trial, both parties were allowed to fully explore the circumstances of Davis's arrest and detention, the fact that Davis had changed his "story" from the one he had given earlier to the prosecution and the defense, and that the State had promised Davis immunity from prosecution for any crime predicated on the Bell incident. This exploration, of course, was crucial to the jury's evaluation of the credibility of Davis. Second, even if the law enforcement officials violated Davis's right to be secure in his person, his right not to be compelled to be a witness against himself, and his right to have counsel present during any interrogation, are these rights personal to to Davis and can only be asserted by him and not by some other person, such as appellant, who might be adversely affected by information elicited during the detention and interrogation. Cf. Brown v. United States, 411 U.S.

223, 230, 93 S. Ct. 1565, 1569, 36 L. Ed. 2d 208 (1973); United States v. Noble, 422 U.S. 255, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); Faretta v. California, 422 U.S. 806, 816, 95 S. Ct. 2525, 2533-34, 45 L. Ed. 2d 563 (1975).

Appellant also charges that in the guise of questions and in closing argument, the prosecution made declarative statements calculated to bolster the credibility of Davis to the prejudice of the appellant. With thses charges in mind, we have re-read those parts of the record cited by appellant and find no basis for the charge.

Appellant also takes issue with the fact that, in questioning Davis, the prosecution brought out the fact that Davis had been granted immunity from prosecution in exchange for testimony relative to the Bell incident. Appellant argues that this was misleading in that the prosecution had not taken procedural steps to insure that Davis had immunity. Appellant does not indicate how he could be prejudiced by the action of the prosecution, nor can we see any basis for prejudice resulting from the statement that Davis had been granted immunity. Such a fact could serve only to diminish Davis's credibility in the eyes of the jury to the advantage of appellant. Furthermore, appellant's insurmountable problem in this case was not Davis's testimony, but the testimony of the three eyewitnesses, two of whom looked into the barrel of the pistol held by appellant and were shot by him.

Appellant further insists that the prosecution improperly withheld notice to the defense of the exis-

tence of the witness, Debra Ann Smith, until eleven days before the trial began. Interestingly enough, no complaint was directed to the prosecution's action, or rather inaction, until the motion for new trial was filed in behalf of appellant. This probably was due to the fact that the prosecution gave notice that Debra Ann Smith would be a witness within the minimum time requirement set forth in Rule 12.1 (b) of the TENNESSEE RULES OF CRIMINAL PROCEDURE. But whatever the reason, we now find nothing in the record to indicate that the time of notification hindered counsel's preparation for trial or his ability to adequately represent his client in the trial.

Appellant also takes issue with the time frame for the crimes set forth in the motion by the prosecution to require appellant to give notice of his intention to offer a defense or alibi. The time frame for the crimes set forth in the motion was "July 5, 1980, between 10:00 p.m. and 10:10 p.m." On trial, the proof indicated that the crimes were likely committed between 9:55 p.m. and 10:00 p.m. Appellant insists that he was prejudiced by the five to ten minute time differential. How he was prejudiced is not clear, since appellant did not limit his alibi evidence to the ten minute period set forth in the motion. but covered the period from 9:00 a.m. on July 5, 1980, until the following morning. This testimony necessarily would be the same for both time frames, and no prejudice could result from a five to ten minute differential between the time frame for the crimes set forth in the motion and the time frame proven by the

several witnesses who testified.

In a general assignment of error directed to the sentencing hearing, appellant insists that evidentiary rulings by the trial court, "constitute error, deprive the jury of guidance needed to evaluate the [appellant's] mitigating circumstances, and result in an arbitrary and capricious sentence of death." In the course of discussion of this assignment, appellant insists that the trial court erred in excluding testimony of expert witnesses on the validity of the death penalty as a deterrent to crime, the moral and ethical standards of conduct of western civilization, and the relationship between youth and accountability for decision making. The experts were to testify on these issues generally, since neither of them had ever seen or spoken with the appellant, or had reviewed his record.

In this state, the legislature has provided that where it is found that the defendant is guilty of first degree murder, a second proceeding is to be held before the same jury to determine the sentence--either life imprisonment or death--to be imposed T.C.A. § 39-2404 (a). The jury may impose the death penalty only upon finding that one or more aggravating circumstances, listed in the statute, are present, and further that such circumstance or circumstances are not outweighed by any mitigating circumstance. T.C.A. §§ 39-2404 (g) and (i). The burden of proof rests upon the state to establish the aggravating circumstances beyond a reasonable doubt and the jury must

specifically find that these outweigh any mitigating circumstances before they are justified in imposing the death penalty. T.C.A. § 39-2404 (f). These separate determinations must be put in writing and given to the trial judge along with the sentence of death, thus assuring that the jury has gone through the correct analysis in arriving at a death sentence. T.C.A. § 39-2404 (g).

In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973 (1978), the Supreme Court points out that the:

> Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kinds of capital cases, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The Court emphasized, however, in a footnote to this sentence that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 98 S. Ct. at 2965 n. 12.

The legislature of this state has gone even further than is required by Lockett v. Ohio, supra, and has provided in T.C.A. § 39-2404 (c)

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated . . . below; and any evidence tending to establish or rebut any mitigating factors. Any such evi-

dence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence. (emphasis supplied)

The evidence tendered by the appellant and excluded by the trial court was not relevant to, nor did it have any probative value on the issue of punishment, but consisted of matters properly to be considered by the legislature in deciding whether the death penalty is ever a justified punishment for a person convicted of murder in the first degree and, if the circumstances under which the death penalty should be imposed. Cf. Houston v. State, 593 S.W. 2d 267 (Tenn. 1980), cert. denied, 101 S. Ct. 251, 66 L. Ed. 2d 117. The trial court thus correctly excluded the evidence.

In this case, with respect to each of three murders, the jury unanimouly found the following aggravating circumstance to exist:

> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. T. C. A. § 39-2404 (i) (6)

and, in addition with respect to the killing of Robert Bell, III, the jury found the following statutory aggravating circumstances:

> (3) The defendant knowingly created a great risk of death to two or more persons, other than the victims murdered during his act of murder. T.C.A. § 39-2404 (i) (3)
>
> (7) The murder was committed while the defendant was engaged in committing robbery. T.C.A. § 39-2404 (i) (7)

The jury also specifically found that there were no mitigating circumstances sufficiently substantial to

outweigh the statutory aggravating circumstances, and fixed appellant's sentence at death on each finding of murder in the first degree.

From our review of the record, we are of the opinion that the evidence proves appellant's guilt of the several crimes charged beyond a reasonable doubt. We are also of the opinion that the evidence supports the jury's imposition of the death penalty on its finding of aggravating circumstances listed in the Tennessee Death Penalty Act and the lack of any mitigating circumstance. Further, we are of the opinion that under the circumstances of this case, as shown by the evidence, the imposition of the death penalty by the jury was neither arbitrary nor excessive or disproportionate to the penalty imposed in similar cases.

Appellant sought to have the trial judge, in his instructions to the jury, inform the jury that evidence had been tendered to show that the death penalty has no deterrent effect upon crime and that the death of appellant would not benefit society or comply with moral and ethical standards of the day, and that the trial judge had excluded the evidence. Appellant insists it was error for the trial judge not to give the requested instruction since appellant's counsel had indicated to the jury in his opening statement that such evidence would be forthcoming. We see no merit in this insistence. The trial judge is under no duty to specifically note or explain his rulings on the admissibility of evidence, nor should he call

the jury's attention to evidence that has been excluded. The jury's responsibility is to decide the issues on the evidence submitted, not on what the appellant attempted to show.

Appellant takes issue with the action of the trial court in striking the affidavits of a juror and counsel for appellant, which were submitted to the court in support of appellant's motion for new trial. Appellant insists the affidavits reveal that the sentence of death in this case is the result of extraneous, prejudicial information and is the product of mistake and that appellant is entitled to a new sentencing hearing. On reading the affidavits, which were included in the record in this court, we are of the opinion that the action of the trial court was proper; and, in any event, the facts set forth in the affidavits do not show that the sentence of death was either the result of extraneous, prejudicial information, or was the product of mistake.

The substance of the juror's affidavit was that she did not understand that she could have voted for life; that she felt like she was locked in (on the death penalty); that she thought she would have to explain her vote to the judge if she voted for life; that she was afraid the judge would look at her and say, "Well, why did you do it?" that she was not afraid of the judge, but was afraid that she would be embarrassed. The juror further stated that she now believes, deep down in her heart, that Cecil Johnson did not commit the crimes.

It is settled law in this state that a juror can not impeach her verdict, and that a new trial will not be granted upon the affidavit of a juror that she misunderstood the instructions given the jury by the trial judge, provided the instructions were correct. Batchelor v. State, 213 Tenn. 646, 378 S.W.2d 751, 754 (1964); Norris v. State, 22 Tenn. 333 (1842). See also Montgomery v. State, 556 S.W.2d 559 (Tenn. Crim. App. 1977). The instructions in this case were complete and clear, the jury had the instructions before them as they deliberated, and, according to the affidavit, the juror in question read the instructions. She can not now impeach her verdict.

The affidavit of counsel for appellant was based on a telephone conversation he had with juror George B. Davis. When the contents of the affid were made public, Mr. Davis filed a statement with the court taking issue with parts of the affidavit and clarifying others. On motion, the trial judge struck both the affidavit and Mr. Davis's statement, which was in letter form. We agree with his action. The documents show no more than that the jurors understood the court's instructions and properly applied them to the evidence as they found it, despite a reluctance to impose a death sentence. Furthermore, there is nothing in the documents to indicate that the jury based its decision on any extraneous matter or outside prejudicial influence, as charged by appellant.

In a supplemental assignment of error, appellant questions the propriety of the trial court's

excusing three jurors for cause. Appellant insists that the trial court excluded these jurors on the basis of a statement of general opposition to the death penalty, and that this was in violation of the rule set forth in Witherspoon v. Illinois, 391 U.S. 510, 513-514, 88 S. Ct. 1770, 1772, 20 L. Ed. 2d 776 (1968), and followed by this court in State v. Harrington, 627 S.W.2d 345 (Tenn. 1981). Our view of the position taken by the jurors on voir dire examination differs from that of the appellant. As we read the record each of the jurors clearly indicated that he would not consider the death penalty under any circumstances and would automatically vote against its imposition, whatever the evidence and whatever the instructions of the trial court. The jurors having taken this stand, it was mandatory for the trial court to excuse them from service, if the jury were to be impartia

All assignments of error are overruled. T judgment of conviction in each case and the sentence imposed are affirmed. The death sentence will be carried out as provided by law on June 29, 1982, unless otherwise stayed or modified by appropriate authority. Costs are taxed to appellant.

R E Cooper

Robert E. Cooper, Justice

Concur:
Harbison, C.J.
Fones and
Drowota, JJ.

Dissenting in part and
Concurring in part:
Brock, J.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,

Appellee,

v.

CECIL C. JOHNSON, JR.,

Appellant.

Davidson County Docket
No. 81-16-I

OPINION CONCURRING IN PART;
DISSENTING IN PART

For the reasons stated in my dissent in State v. Dicks, Tenn., 615 S.W.2d 126 (1981), I would hold that the death penalty is unconstitutional; but, I concur in all other respects.

Brock

BROCK, J.

APPENDIX B:

Order of the Supreme Court of Tennessee
Denying the Petition to Rehear

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,)
APPELLEE)
)
)
VS.) DAVIDSON CRIMINAL
)
)
CECIL C. JOHNSON, JR.,)
APPELLANT)

O R D E R

The petition to rehear filed on behalf of Cecil C. Johnson, Jr., is denied at cost of the petitioner.

This the 21st day of May, 1982.

R E Cooper

Robert E. Cooper, Justice

Concur:
Harbison, C.J.
Fones and
Drowota, JJ.

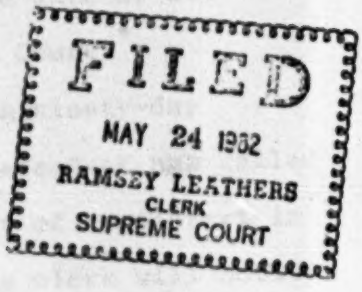
Dissent:
Brock, J.

APPENDIX C:

Order of the Supreme Court of Tennessee
Staying Execution Pending a Petition for Certiorari

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



STATE OF TENNESSEE,)
APPELLEE)
)
)
VS.) DAVIDSON CRIMINAL
)
)
CECIL C. JOHNSON, JR.,)
APPELLANT)

STAY ORDER

Upon motion of the appellant-defendant, Cecil C. Johnson, he is hereby granted a stay of execution of the judgment of this court for a period of 90 days from May 21, 1982 pending the filing and disposition of a petition for the writ of certiorari in the Supreme Court of the United States, his conviction having been affirmed by the Supreme Court of Tennessee on May 3, 1982, and the petition to rehear denied on May 21, 1982.

A copy of the petition for certiorari will

be filed promptly with the clerk of this court, certified by counsel and showing the date of its filing in the United States Supreme Court.

At the conclusion of such ninety-day period, however, if the appellant-defendant has failed to perfect his petition for the writ of certiorari in the United States Supreme Court, the clerk will notify the Sheriff of Davidson County, the Honorable Lamar Alexander, Governor of the State of Tennessee, the Warden of the State Penitentiary, and the Clerk of the Criminal Court of Davidson County, Tennessee, that the judgment heretofore entered by this court will be carried out.

The clerk of this court will issue a duly certified copy of this order to the Clerk of the Criminal Court of Davidson County, Tennessee; to the Honorable Lamar Alexander, Governor of the State of Tennessee; to the Sheriff of Davidson County; and to the Warden of the Tennessee State Penitentiary.

ENTER this the 21st day of May, 1982.

R E Cooper

Robert E. Cooper, Justice

Sheriff & Wa

APPENDIX D:

Oral Remarks by the Trial Court upon the Motion for New Trial

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE	)	Case No. C-6732A
	)	
VS	)	
	)	
CECIL C. JOHNSON, JR.,	)	

POST-TRIAL MOTIONS

APPEARANCES:

THE HONORABLE A. A. BIRCH, JR., PRESIDING JUDGE

FOR THE STATE:

Mr. Thomas A. Shriver
District Attorney General
Metropolitan Courthouse
Nashville, Tennessee 37201

Mr. Sterling Gray
Assistant District
Attorney General
Metropolitan Courthouse
Nashville, Tennessee 37201

Mr. Victor Johnson
Assistant District
Attorney General
Metropolitan Courthouse
Nashville, Tennessee 37201

MR. ENGLE: Yes, Your Honor.

(Whereupon oral argument was heard on the Motion for a New Trial.)

THE COURT: All right, gentlemen, of course I am going to think about this and to get to work on it right away. I expect maybe to have an order ready to enter sometime next week. I might say though that at this point I do find that the allegations of bad faith made by the defendant against the State have no, no support in the evidence at all and they are not supported. I also find that the defendant's lawyers have provided with a very, very excellent defense throughout and a defense which is consistent with the highest standards of the Nashville bar.

Is there anything further?

MR. JOHNSON: Nothing from the State if Your Honor please.

MR. ENGLE: No, Your Honor. I assume that we will also rely upon our pleadings on the motion for consecutive sentencing and our written answer thereto.

THE COURT: All right.

(COURT ADJOURNED)

----------END OF REQUESTED TRANSCRIPT----------

APPENDIX E:

Order of the Trial Court Denying the Motion for a New Trial

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGES 110 AND 111

C-6732A
ORDER
OVER-
RULING
MOTION
FOR
NEW TRIAL

STATE OF TEXAS

VS.

CECIL C. JOHNSON, JR.

ROB. W/DEADLY WEAPON, 2 CTS.,
MURDER 1ST DEG., 3 CTS., ASST. W/INT.
COM. MURDER 1ST DEG., 2 CTS.

ORDER

This cause came on to be heard upon the defendant's motion for new trial, testimony and evidence, statement of counsel, and upon the entire record. The Court finds as follows:

I a (1) - (4)

These matters address themselves primarily to the rights of Victor Davis. This witness testified and was cross-examined quite vigorously about his motives to tell the truth or swear a falsehood. The entire circumstances of his arrest, recantation, and his giving a written statement in his lawyer's presence were fully explored by the defendant on cross-examination.

The witness did not become a part of the "defense team" by virtue of his prior statement supporting the defendant's theory. He was fair game, and considering the totality of the circumstances and the magnitude of the case, the conduct of the District Attorney and his agents in obtaining Victor Davis' true statement was consistent with their sworn duty. Moreover, this Court doubts that the defendant has standing to complain of alleged violations of Victor Davis' rights.

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGES 110 AND 111

RDER
VER-
ULING
OTION
OR
EW TRIAL

STATE OF TENNESSEE

VS.

CECIL C. JOHNSON, JR.

ROB. W/DEADLY WEAPON, 2 CTS.,
MURDER 1ST DEG., 3 CTS., ASST. W/INT.
COM. MURDER 1ST DEG., 2 CTS.

ORDER

This cause came on to be heard upon the defendant's motion for new trial, testimony and evidence, statement of counsel, and upon the entire record. The Court finds as follows:

I a (1) - (4)

These matters address themselves primarily to the rights of Victor Davis. This witness testified and was cross-examined quite vigorously about his motives to tell the truth or swear a falsehood. The entire circumstances of his arrest, recantation, and his giving a written statement in his lawyer's presence were fully explored by the defendant on cross-examination.

The witness did not become a part of the "defense team" by virtue of his prior statement supporting the defendant's theory. He was fair game, and considering the totality of the circumstances and the magnitude of the case, the conduct of the District Attorney and his agents in obtaining Victor Davis' true statement was consistent with their sworn duty. Moreover, this Court doubts that the defendant has standing to complain of alleged violations of Victor Davis' rights.

I B (1) - (3)

Every trial Judge knows that in every case there are instances where lawyers engage in "side talk," ask open-ended questions, improper questions, questions in statement form, misleading questions, double negative questions, double entendre questions, and questions which could not possibly be within the witness' knowledge. This case is no exception, and both sides, in their zeal to advance their respective theories, have made statements, or proper statements made at inappropriate times. The Court believes that this is cured by instructing the Jury, as the Court did, that "statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them."

I C

The comment made was improper. It mentioned matters not in evidence. However, its essence was mild and its thrust feeble. The statement did not attack the defendant in theory nor in person. The statement was neither inflammatory in content nor by delivery. The Court considered a curative instruction sua sponte, but decided against it for the following reasons:

A. No objection to the statement was made.

B. The Court did not know of defense counsel's plans with regard to a possible answer, and did not want to second-guess the defendant's trial strategy or deprive him of the right to rebut.

C. To have intervened sua sponte may well have compounded the effect of the statement by drawing attention to it and emphasizing it.

D. The District Attorney, in the Court's opinion, was acting in good faith.

The Court, at that point, viewed the proof against the defendant as being extremely strong and overwhelming in support of the defendant's guilt, and this Court, therefore, concludes that the improper statement had no effect on the verdict of the Jury, and in no way prejudiced the defendant or influenced the Jury. The Court also concl[illegible]t there are no errors in the record sufficiently significant [illegible] with the improper statement to produce a "cummulative effect."

I e, f

The Court finds that the matters alleged are mere inadvertences, and the record bears out the fact that no right of the defendant was prejudiced or diluted by the conduct complained of.

The Court concludes that the District Attorney General and his agents conducted both the investigation and the trial in a commendable manner, and in good faith as is inherent in his responsibility.

II

A. The Court ruled that the religious denomination, if any, and the political party affiliation, if any, of prospective jurors were matters beyond the scope of voir dire. The Court stands by this ruling.

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGES 111 AND 112

B. The Court ruled that it was improper to ask a potential juror to characterize himself as a "leader" or as a "follower." An answer to this question would tend to enhance or diminish a juror's concept of his duty. The Court stands by this ruling.

C. (5) The Court did, while conducting its preliminary voir dire, say, "The punishment for first degree murder is death, but the Jury may commute the punishment to life imprisonment." Four prospective jurors heard this, and when the matter was brought to the Court's attention, the Court corrected the statement, and admonished those four persons to disregard the prior statement. Only one of the four persons ultimately served on the panel.

In any event, the defendant exercised only a portion of his peremptory challenges, and had eight challenges remaining when jury selection was complete.

The Court is satisfied that the voir dire of the Jury was properly conducted and that the inquiries prohibited by the Court were as to matters which were not appropriate in the Court's opinion to inquire into. The Court extended to defense counsel wide latitude in their proper attempts to expose bias or prejudice. The Court is of the opinion that the Court's ruling on challenges for cause were entirely proper and correct.

III

A. The testimony was not relevant, and had no probative value on the issue of punishment.

B. The existence of the electric chair is not relevant to nor does it have any probative value on the issue of whether the death sentence was "real in law and fact." The jurors, from voir dire onward, and possibly before that, were certainly aware of the impact of their verdicts.

C. The tape recording was excluded from evidence because:

1. It was hearsay and the State was given no opportunity to rebut the matters contained therein.

2. The auditory quality of the recording was poor, and it could not be understood when played.

D. The Court excluded the testimony of the "ethicist" because he sought to give an opinion upon a subject which was within the grasp of ordinary men -- therefore, making the opinion unnecessary -- the Jury could navigate without it. Moreover, the opinion was not predicated upon any fact proved on the trial, nor was it based on any examination of or conversation with the defendant.

IV, V, VI, VII

The Court feels that the Jury was properly and adequately instructed in both phases of the trial.

VIII

Prior to the start of the trial, the Court advised defense counsel that they would be afforded ample time to examine Rule 16 statements. Further, the Court informed counsel that if at any time they needed additional time to examine this material, the Court would oblige. The Court declined to enter into any inflexible agreement regarding this matter.

IX

The Court has previously ruled on the admissibility of Debra Ann Smith's testimony. There has been no showing of prejudice suffer by disclosure of this witness' identity to the defendant eleven days prior to trial.

X

This aggravating circumstance was charged in the statutory language.

XI

From the proof, it appeared to the Court that the defense knew more about Victor Davis than did the State. In any event, the State advised the defendant of the particulars of the "last minute development" regarding Victor Davis promptly.

XIII

The question of bond has never been presented to this Court.

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGE 112

XIV

Trial Exhibits 1, 2, 6, and 12 were relevant, had probative value on the issues involved, and were devoid of inherent prejudice and were in no way inflammatory.

This Court concludes, therefore, that this defendant was ably represented, that the evidence admitted was relevant and of probati value, that improper evidence was excluded, that a fair and impartia jury, correctly instructed, deliberated upon their verdict properly and reached such verdict based upon the law and the evidence as truth and justice dictated.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the defendant's motion for new trial be, and is hereby, and in all respects, overruled.

This the 9th day of March, 1981.

A. A. BIRCH, JR.
JUDGE

APPENDIX F:

Motion for a New Trial

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION III

FILED

'81 FEB 19 PM 3 48

JOHN LASHLEE, CLERK

STATE OF TENNESSEE	)	
	)	
VS.	)	NO. C-6732A D.C.
	)	
CECIL C. JOHNSON, JR.	)	

MOTION FOR A NEW TRIAL

Comes the defendant and respectfully moves the Court to grant him a new trial upon the jury's determination of guilt on the 19th day of January, 1981, and/or upon the jury's sentence of death by electrocution on the 20th day of January, 1981. Tennessee Rules of Criminal Procedure 33. TCA §39-2404(k) (1980 Supp.).

In support of his motion, he would show as follows:

I. Improprieties in the conduct of the prosecution had a cumulative effect which denied the defendant his right to a fair trial conducted in compliance with due process requirements and which hindered the effectiveness of his counsel in preparing and presenting his defense. In specific terms, these improprieties included the following:

a. The prosecution transcended legal protections and ethical considerations in successfully obtaining the testimony, at trial during their case-in-chief, of the witness Victor Davis, whose evidence was self-acknowledged to be in complete contradiction to the numerous previous statements he had made to defense and prosecution investigators. These excessive violations included the following:

(1) Causing the illegal arrest and detention of Victor Davis, who was then under subpoena to trial as the defendant's principle alibi witness.

(2) Interrogating Victor Davis in the absence of his counsel (who the witness had retained in a seperate felony case in which his

100.

petition for probation was then pending), despite the suspect's repeated requests to speak with his counsel and his expressed intentions to remain silent until he was permitted such a consultation.

(3) Interrogating Victor Davis from shortly after midnight until approximately 4:00 AM, when the witness finally agreed to offer testimony helpful to the prosecution.

(4) Interrogating Victor Davis while the three(3) prosecutors present knew, or should have known, him to be intoxicated upon illegal drugs and alcohol.

(5) Threatening Victor Davis with incarceration for his conduct earlier that evening upon a charge of "suspicion of robbery" of a service station, which offense exists neither in law or fact, and

(6) Threatening Victor Davis with indictment upon the same murder, robbery and assault charges facing the defendant, should the witness persist in testifying for the defense in accord with his previous written statements of complete alibi.

b. The prosecution's direct examination of their witness Victor Davis was improperly conducted and, despite defense objections, the Assistant District Attorney General's questions included the following errors:

(1) Announcing, in the presence of the jury, various matters not of previous record by making declarative statements in the purported context of leading questions, without a foundation, such as "you knew that I'd been looking for you, didn't you"; "what did I tell you"; "what did I promise you"; and "now you've been promised immunity for your testimony, haven't you."*

(2) Offering an opinion upon the veracity and credibility of the witness by uttering the purported question "until after you'd told me the truth, had I promised you immunity.", and

(3) Testifying, in the context of a purported question, as to an alleged grant of "immunity" to the witness when, as a matter of law, immunity had not been granted as the prosecutor had not moved the Court to grant immunity and the witness had not previously refused to testify before the Grand Jury

*As the trial transcript is not yet available, all references to specific remarks made during the course of the trial are paraphrased from defense counsel's memory and trial notes.

101.

about an offense in relation to which he had been ordered to testify, wherefore the Assistant District Attorney General's improper allegation of the existence of immunity legally constituted only an oral promise that he would not prosecute the cooperating witness although the Jury was misled to believe that the witness had earned legal protections.

c. During the defense direct examination of their expert penalty-phase witness, Dr. Les Hutchinson, the Attorney General rose for the apparent purpose of entering an objection to a question, but instead remarked "Your Honor, counsel knows that's improper" when the defense attorney was properly tendering questions in accord with the Court's previous procedural rulings; which comment by the prosecutor was improper, was unnecessary, implied that defense counsel was intentionally violating his ethical obligations as an attorney, implied that defense counsel was intentionally violating an evidentiary ruling of the Court which had been made while the Jury was sequestered, and disparaged the defendant's attorney in the presence of the Jury.

d. The Attorney General made improper and inflammatory comment during his closing argument upon the guilt-innocence phase when he advised the Jury that he had a special reason for being interested in this particular prosecution and a personal interest in its outcome, and then told the Jury that the prosecutor's daughter had attended a neighborhood elementary school with the twelve (12)-year old murder victim, asserting that the two (2) children had played together before the minor's death, which relationship was not in evidence.

e. Although the prosecutors had obtained a written statement from their witness Debra Smith on the 15th day of July, 1980, the prosecution failed to disclose the existence or identity of the alleged eyewitness until the 2nd day of January, 1981 (eleven (11) days before the start of this trial), even though they had filed a September, 1980 answer to the defendant's request for discovery which alleged that all of the State's witnesses were listed upon the indictment, which delay and concealment hampered the defendant's last-minute preparations for trial and hindered the defendant's ability to effectively investigate the crucial eyewitness before undertaking her cross-examination.

f. Having filed a Motion for Notice of Intent to Rely upon an Alibi Defense, having specified therein that the alleged crime occured between the hours of 10:00 PM and 10:05 PM, and having received the defendant's November 17th Answer affirming an intention to rely upon an alibi and setting forth the defendant's whereabouts during the times alleged by the State, the prosecution refuted their own prior declaration at trial and introduced the testimony of seven (7) witnesses during their case-in-chief*, each of whom gave evidence that the crime was completed before

*These seven(7) witnesses are Louis Smith ("shortly after 9:30 PM"), Bob Bell ("between 9:30 and 10:00 PM, probably about 9:40 PM"), Metro Police Officer Wesley Carter ("received a radio call at 10:00 PM reporting the incident had already ended and arrived at the scene at 10:04 PM"), Medical Examiner Dr. Ashurst ("estimates the time of the victim Moore's death at 9:30 PM"), Adera Hereford ("9:55 PM and before 10:00 PM"), Walter Davis ("9:55 PM") and Amanda Perry ("it wasn't 10:00 PM yet").

10:00 PM, which variance between their prior written notice and proof at trial substantially prejudiced the alibi defense which presented unimpeached evidence of the defendant's whereabouts elsewhere at the designated hour of 10:00 PM and which variance significantly impaired the defendant's ability to contradict this surprising evidence as the police tape recordings reflecting the actual time of the first relevant complaint call had been mysteriously erased despite agreement that they be preserved.

II. The nature of the voir dire examination of the jury and the limitation upon the scope of the defendant's inquiries into the potential juror's qualifications prevented the defendant from intelligently selecting those who would sit in his judgment and deprived the defendant of his right to a fair trial. These errors included the following:

a. The defendant was denied the opportunity to inquire into the potential jurors' religious denomination and political affiliations, even though such voluntary associations are acknowledged to have a significant and predictable correlation to the juror's attitudes concerning the imposition of the death penalty.

b. The defendant's attorneys were prohibited from inquiring if the prospective jurors had preconceptions of their potential obligations as to any perceived civic duty to convict persons on trial, as to whether they would consider themselves to be leaders or followers, and if they could properly presume that a sentence of life imprisonment meant that the defendant would be imprisoned for life while a sentence of death meant that the defendant would be electrocuted until dead.

c. Upon motion by the State and inquiry by the Court without an opportunity for the defendant to attempt rehabilitation of challenged prospective jurors or to attempt clarification of their legal and ethical positions, several prospective jurors were excused for cause. Defendant alleges that such excuse and disqualification was reversible error owing to the following considerations:

(1). The defense was deprived of an opportunity to demonstrate the juror's competence and qualification despite their apparent confusion and possible misunderstanding of the questions addressed in the State's examination and during the Court's inquiry.

(2). The defendant was thereby deprived of jury composed of a legitimate and fair cross-section of the community, which would inherently include persons stating an initial opposition to the death penalty.

(3). The exclusion of these prospective jurors who stated a reluctance to impose the death penalty resulted in the limitation of the panel to those persons who were prone to conviction of the defendant upon the guilt-innocence phase and the qualifying questions improperly directed the juror's attention to the issue of punishment in a premature neglect of the presumption of innocence.

(4). When several prospective jurors stated under oath that their moral, social and ideological opposition to the death penalty would not lead them to ignore the law as instructed by the Court or to violate their oath as jurors should they reach that issue of punishment, their excuse for cause improperly deprived the defendant of a fair trial.

(5). During the Court's qualification of the first (1st) four (4) prospective jurors, they were erroneously instructed that the punishment for murder in the first degree was death "which the jury may commute to life imprisonment" and, although the Court issued correcting instructions to disregard this premise, the clarification before the entire prospective panel did not remove this taint and only introduced and reinforced the misconception before other jurors too numerous to be excused by the defendant's remaining peremptory challenges.

III. During the trial of the penalty-phase, the defendant's attempts to introduce proof in support of his allegation of the existence

105.

of non-statutory mitigating circumstances was severly limited or prohibited by the Court's evidentiary rulings, which restrictions were erroneous in the following manners:

a. The testimony was relevant and probative of the defendant's statutory and alleged non-statutory mitigating circumstances in support of a verdict of life imprisonment.

b. The exclusion of the eyewitness testimony by a stipulated expert in criminal-defense law as to the appearance of the electric chair, with tender of an appended photograph in exhibit, and its adjacent premises prevented the defendant from establishing the State's affirmative compliance with the statutes pertinent to the maintainence of such facilities, prohibited the defense from proving that a prospective sentence of death was real in law and fact, and denied the jurors an opportunity to learn of the actual impact of their prospective judgment.

c. The defendant should have been permitted to introduce a tape recording of the penalty-phase opinion of the wife of one of the victims, which witness had been an original prosecutor upon the indictment.

d. After the testimony without the presence of the jury of an expert in criminal defense law who opined that the most significant, evidentiary factors in obtaining a verdict of life imprisonment after conviction of murder in the first degree were proof of the absence of a deterent effect in imposition of the death penalty and defense testimony concerning the religious and moral considerations relevant to the jury's deliberations, the defense should have been permitted to introduce such available

testimony after their good-faith announcement during opening argument that it would be forthcoming as such evidence was, in the expert's opinion, relevant and as several prospective jurors had stated that they believed the death penalty to be significant to religious and moral considerations and/or to possess an inherent deferent impact.

IV. The denial of certain special instructions requested by the defense in reliance upon reported law and the facts in the case at bar denied the defendant a fair trial through errors which included the following:

a. Identification of the defendant as the alleged perpetrator came into issue during cross-examination of the State's purported eyewitness and was magnified by the defendant's reliance upon an alibi defense, but the defendant's request for a special instruction predicated upon Sloan et al. was denied in favor of the pattern instruction which fails to give the Jury adequate guidance in the evaluation of identification testimony.

b. The Court refused to modify the pattern instruction by inclusion of an expanded definition of the defense of alibi, which extension had been suggested by the Tennessee Court of Criminal Appeals.

c. Although the State's evidence clearly showed that the alleged crime was a murder committed during the conduct of a robbery, the Court refused to instruct the Jury, as requested, upon felony-murder and, improperly held that the prosecutor was entitled to elect under which

of the two (2) varieties of common-law murder they would proceed, even though the Court subsequently and inconsistently instructed the Jury that they could find a statutory aggravating circumstance if the murder was committed during a robbery.

d. Although the Assistant District Attorney General had misused the term "immunity" during his improper examination of the witness Victor Davis (see I. b (3) above), the Court refused three (3) special requests for instructions which defined the legal concept and its impact, described its proper legal invocation, and set forth its relevance in considering the impeachment of a witness, with the result that the prosecutor's erroneous statement of law was left uncorrected and the Jury was forced to speculate upon the legal significance of the term.

e. The Court should have granted the special requests to instruct that a verdict of life imprisonment could be returned even if an aggravating circumstance was found, that mitigating factors need not outweigh aggravating circumstances to return a verdict of life imprisonment, and that the Jury could reject the death penalty even if they failed to find a single mitigating circumstance.

f. After excluding the defendant's penalty-phase proof as to the existence of non-statutory mitigating circumstances despite defense counsel's good-faith assertion during opening statement of intent to prove such factors, the Court should

have granted special requests to the effect that they were not to consider whether the death penalty had any deterent effect upon crime and that counsel's announcement of intent to prove these non-statutory mitigating circumstances should be disregarded as a matter of law which could not enter into their deliberations.

V. As the State's proof clearly established that the alleged offense was a murder committed during the perpetration of a felonious robbery, although the Court refused to so instruct the Jury, the convictions of murder (third, fourth and fifth counts of the indictment) merged with the convictions of robbery accomplished with the use of a deadly weapon (first and second counts of the robbery) under the felony-murder rule and it was error to convict the defendant upon both offenses. In the alternative, if the Court is of the opinion that premeditated murder was proven without imposition of the common-law felony-murder doctrine, then it was error to instruct the Jury that they could find felony-murder as a statutory aggravating circumstance. Defendant asserts that assault with intent to commit first degree murder (sixth and seventh counts of the indictment) also constitutes a felony which merged by legal operation of the felony-murder rule or, during the penalty-phase, merged with both the instructed aggravating circumstances of risk to two (2) or more persons (#3) and avoiding prosecution (#6).

VI. By mandatory joinder of three (3) counts of murder in the first degree (count numbers 3, 4 and 5), the State is not entitled, upon conviction, to a de facto finding of the aggravating circumstance that the incident presented risk to

two (2) or more persons (§§ 3), wherein the Jury could consider each conviction for murder seperately and conclude that the other two (2) murder convictions automatically established the aggravating circumstance, and the Jury should have been instructed that they were not to consider other joined murder charges in evaluating a risk to two (2) or more persons.

VII. It was inherently inconsistent for the Jury, under these facts, to conclude in penalty judgment upon the third (3rd) count of the indictment wherein the child, Bob Bell III, was the victim that the defendant qualified for death under three (3) aggravating circumstances (to wit: #3 - risk, #6 - avoiding prosecution, and #7 - robbery) and to simultaneously conclude upon the fourth (4th) and fifth (5th) counts that the defendant's alleged crime was aggravated by only one (1) circumstance (to wit: #6 - avoiding prosecution).

VIII. The defense was hampered and prejudiced by the Court's denial of the defendant's pretrial motion to establish rational and consistent procedures for the expedient exchange of the prior written statements of the adversary's witnesses (i.e. Little Jencks' Act materials), which adverse ruling came to be of critical impact when the prosecution passed frequently voluminous materials to defense counsel at the immediate close of direct examination and the Jury was either sent out for brief recess (in possible implication that the defendant's attorneys had not properly prepared for their cross-examination) or, on occasions, remained in the courtroom while silence surrounded counsel's race through the extensive documents and making of quick contrasts with prior investigative reports before jumping to their feet to begin the witness' cross-examination.

IX. The testimony of the State witness Debra Smith, who testified during their case-in-chief, should have been excluded due to

impermissible taints upon her in-court identification, such as multiple exposure to the defendant's image in the media and the exhibit of a photo of the defendant to the witness in the prosecutor's office immediately prior to her first appearance in court upon a motion to surpress, and due to the State's failure to make timely disclosure of the existence of the witness, who was known to them by written statement on July 15th but not revealed until January 2nd ----- eleven (11) days before trial was to begin.

X. The alleged aggravating circumstance (#6 - that "the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant") was instructed over the defendant's objection and should have been excluded as overly broad, vague, and not supported by the facts introduced into evidence.

XI. The State failed to comply, as promised in writing, with Rule 12.1 (B) in that they failed to advise the defendant of the existence of a witness (to wit: Victor Davis) who they intended to rely upon to refute the defendant's claim of alibi until the day before trial (i.e. January 12th) even though the Rule requires that such witnesses be identified at least ten (10) days prior to trial, wherefore the witness should not have been permitted to testify during their case-in-chief especially since the defendant had filed a motion to exclude such undisclosed testimony on January 6th.

XII. The verdict of the Jury did not conform to the evidence presented at trial in the following manners:

a. The judgment of the Jury is contrary to the weight and preponderance of the evidence.

b. The judgment of guilt by the Jury is not supported by substantial evidence sufficient to justify such a finding.

III.

c. The Jury's finding of the absence of any sufficiently mitigating circumstances is not supported by the evidence.

XIII. The defendant was substantially prejudiced and deprived of a fair trial by reason of the denial of bond to permit his pretrial release.

XIV. Although not the subject of contemporaneous objection by defense counsel, defendant avers that it was plain error to permit the prosecution to introduce antiquated photographs of the victims, (trial exhibits #1, #2 and #6) and to exhibit to the Jury photos of the victims in the taxicab (trial exhibit #12 - collective), which items had no probative value or relevance and were intended only to prejudice and inflame the Jury.

XV. As the State has filed a motion for consecutive sentencing, which matter will not be heard until after the date upon which this Motion for a New Trial is due to be filed, the defendant respectfully reserves the right to assert as error upon appeal any future adverse judgment of this Court upon the subject of sentencing.

Defendant reserves the right to submit affidavits in support of the allegations herein.

WHEREFORE, premises considered, defendant alleged that these errors, either singular or in cumulative effect, mandate a new trial upon these issues and respectfully moves the Court either to grant a new trial upon the issue of guilt or innocence, or to order a new trial upon the issue of the appropriate penalty.

Respectfully submitted,

J. Michael Engle

Robert L. Smith

Robert L. Smith
Attorneys for the defendant

112.

I certify that a copy of this motion was delivered by my own hand tc the Office of the District Attorney General for the Tenth Judicial District of the State of Tennessee, addressed to Thomas Shriver, on this 19th day of February, 1981.

J. Michael Engle

cc: Cecil C. Johnson, Jr.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CECIL C. JOHNSON, JR.
Petitioner,

V.

STATE OF TENNESSEE,
Respondent.

NO. 82 5088

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Petitioner, Cecil C. Johnson, Jr., by his undersigned counsel, asks leave to file the attached Petition for a Writ of Certiorari to the Tennessee Supreme Court without prepayment of costs or security therefor and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States. Petitioner's affidavit of indigency in support of this motion is attached hereto.

J. MICHAEL ENGLE
Suite 100, Realtors Building
306 Gay Street
Nashville, Tennessee 37207
(615) 244-6583

ROBERT L. SMITH
Suite 1000
Parkway Towers
Nashville, Tennessee 37219
(615) 244-4850

ATTORNEYS FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CECIL C. JOHNSON, JR.
Petitioner,

V.

STATE OF TENNESSEE,
Respondent.

NO. _____

AFFIDAVIT

I, CECIL C. JOHNSON, JR., being first duly sworn according to law, make oath as follows:

1. I am the petitioner in the above-entitled case.

2. I have been incarcerated without bond since July 6, 1980. Prior to that time, I was employed, but have no wages still owing to me. I do not have a checking account, a savings account or any demand deposits payable to my name. I do not own real property and do not have a car.

3. That by order of the Judge of the Criminal Court for Davidson County, Tennessee, Division III, dated 21 November 1980, I was declared an indigent person unable to pay the expenses necessary for my defense in the trial court.

4. That I was allowed to perfect my direct appeal to the Supreme Court of Tennessee as an indigent without payment of costs or security therefor.

5. Because of my poverty I am unable to pay the costs of the above cause.

6. I am unable to give security for said cause.

7. I believe that I am entitled to the redress I seek in this cause.

AFFIANT SAITH FURTHER NOT.

CECIL C. JOHNSON, JR.

SWORN to and subscribed before me this 17th day of July, 1982.

NOTARY PUBLIC

My commission expires 8-11-84

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5088

CECIL C. JOHNSON, JR,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. GRUNOW
Deputy Attorney General
-Counsel of Record-
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7859

KYMBERLY LYNN ANNE HATTAWAY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2216

OF COUNSEL:

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL & REPORTER
STATE OF TENNESSEE

QUESTIONS PRESENTED FOR REVIEW

I. Whether the cumulative effect of alleged prosecutorial misconduct violated the petitioner's right to a fair trial and infringed upon his right to prepare and conduct his defense.

A. Whether the prosecution acted improperly in "converting" Victor Davis into a witness for the State.

B. Whether the cumulative effect of alleged prosecutorial misconduct at trial denied the petitioner his right to a fair trial.

II. Whether the trial court erred in suppressing at the punishment phase of the trial the proposed testimony of Dr. Thomas Ogletree regarding the relationship between youth and accountability for decision-making or maturity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: Page(s):

Other Authorities Cited:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5088

CECIL C. JOHNSON, JR.,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

The respondent respectfully submits that the petition for writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

On March 9, 1981, the trial court denied the petitioner's motion for a new trial. The judgment of the trial court was affirmed by the Supreme Court of Tennessee on May 3, 1982. That opinion is officially reported at 632 S.W.2d 542.

The petitioner filed a petition to rehear with the Supreme Court of Tennessee on May 13, 1982. The petitioner's petition to rehear was summarily denied on May 21, 1982.

JURISDICTION

The petitioner seeks to invoke this Court's jursidiction under 28 U.S.C. § 1257(3). However, the respondent submits that this record does not present a substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment, United States Constitution:

> . . . (N)or shall any state deprive any person of life, liberty, or property, without due process of law.

Tenn. Code Ann. § 39-2402:

> (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any . . . robbery . . . is murder in the first degree.
>
> (b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-2404:

> (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as a part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . .
>
> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances . . .; and any evidence tending to establish or rebut any mitigating factors . . .
>
> (g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death . . .
>
> (i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of one or more of the statutory aggravating circumstances, which shall be limited to the following . . . :
>
> (3) the defendant knowingly created a great risk of death to two or more persons,

other than the victim murdered, during his act of murder . . . ,

(6) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) the murder was committed while the defendant was engaged in committing . . . any . . . robbery . . .

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) the defendant has no significant history of prior criminal activity . . .

(7) the youth or advanced age of the defendant at the time of the commission of the crime . . .

STATEMENT OF THE CASE[1]

On August 5, 1980, the Davidson County Grand Jury returned a seven-count indictment charging Cecil C. Johnson, Jr. with the following crimes:

Count One - Armed robbery of Robert Bell, Jr. and Robert Bell, III;

Count Two - Armed robbery of Louis E. Smith;

Count Three - First degree murder of Robert Bell, III;

Count Four - First degree murder of James E. Moore;

Count Five - First degree murder of Charles H. House;

Count Six - Assault with the intent to murder Robert Bell, Jr. in the first degree; and

Count Seven - Assault with the intent to murder Louis E. Smith in the first degree. (I, 2-10).

On September 23, 1980, the respondent filed a motion for notice of alibi defense. (I, 15).

On October 17, 1980, the trial court granted the petitioner's request for discovery, inspection and notice of intent to use evidence. (I, 32). The petitioner's request for same and the respondent's answer thereto do not appear in the pleadings.

The petitioner filed a notice of alibi and a motion for disclosure of witnesses on November 17, 1980. (I, 36-37). The pleadings are silent as to the disposition of said motion. On January 3, 1981, the petitioner moved to exclude the testimony of any witness not listed on his motion; the name of Debra Ann Smith

---

[1] References to the record will be referred to by volume and page number. Volume I consists of the pleadings; Volumes II and III consist of the transcript of the pre-trial motion hearings; Volumes IV through X consist of the transcript of the voir dire proceedings; Volumes XI through XVIII consist of the proof adduced at trial; Volumes XIX and XX consist of the proof adduced at the sentencing hearing; and Volume XXI consists of the transcript of the post-trial motion hearing.

appears on the face of the motion. (I, 50-51). The trial court denied this motion on January 8, 1981. (I, 54).

Jury selection began on January 13, 1981, with the taking of proof on January 16, 1981. On January 19, 1981, the jury returned a verdict of guilty as charged; punishment was assessed at life imprisonment on each of Counts One, Two, Six and Seven. (I, 79-80). The sentencing hearing on the convictions for first degree murder as alleged in Counts Three, Four and Five commenced and was completed on January 20, 1981; punishment was assessed at death by electrocution on each count. An execution date of May 20, 1981 was ordered by the trial court. (I, 87-90).

The respondent filed a motion for consectutive sentencing on January 30, 1981. (I, 93-95). The petitioner filed an answer thereto on March 4, 1981. (I, 114-17).

On February 19, 1981, the petitioner filed a motion for judgment of acquittal and a motion for a new trial. (I, 96-113). The respondent filed answers to said motions on March 6, 1981, and March 8, 1981, respectively. (I, 140-51, 155-57).

On March 4, 1981, the petitioner filed a notice of filing of affidavits and an amendment to his motion for a new trial, accompanied by the affidavits. (I, 118-30). The respondent filed a motion to strike the affidavits on March 6, 1981. (I, 152-54).

The petitioner's motion for judgment of acquittal and motion for a new trial were heard and taken under advisement on March 6, 1981. (I, 158). On March 9, 1981, the trial court entered orders denying the petitioner's motion for judgment of acuittal (I, 159); granting the respondent's motion to strike the affidavits (I, 160); overruling the petitioner's motion for a new trial (I, 169-72), with an accompanying memorandum of law (I, 162-168); and granting the respondent's motion for consecutive sentencing (I, 173-75). The trial court also ordered

on the same day the sealing and inclusion in the record of a letter received by the court from juror George B. Davis. (I, 161).

The petitioner filed a notice of appeal on March 11, 1981. (I, 176-77). On March 20, 1981, the petitioner filed a motion for stay of execution pending the filing and disposition of this petition; said motion was granted by the Honorable Chief Justice William J. Harbison on March 23, 1981. (I, 178-80).

The petitioner timely filed the instant petition for writ of certiorari with this Honorable Court.

STATEMENT OF THE FACTS

I. THE GUILT PHASE OF THE TRIAL

A. The Respondent's Proof

Frank House, the brother of the deceased Charles House, testified that the deceased was visiting him at his home which was located in the neighborhood where the crime occurred on July 5, 1980. Around 9:30 p.m., Charles House left to use the telephone at Bob Bell's Market. (XI, 27, 33, 35).

Harry Moore, the father of the deceased James Moore, testified that his son had been a cab driver for Supreme Cab and had grown up in Nashville. (XI, 40-41).

Lewis Smith testified that he was hired by Robert Bell, Jr. [hereinafter referred to as Bell] to rebuild a motor. (XI, 46). On the night of July 5, 1980, he and another young man were working on the motor at Bob Bell's Market. Bell and his son Robert Bell, III [hereinafter referred to as Bobbie] were present at the time. Around 9:30 p.m., Bell left the market to take the young man to his apartment, a trip which probably took around ten minutes to accomplish. (XI, 48, 76-77).

Five minutes after Bell had returned, a man the witness later identified as the petitioner entered the store. (XI, 77). Smith heard Bell and the petitioner arguing; he looked over at the two and saw the petitioner with a cocked pistol held down beside his leg. The petitioner told Bell, "Bob Bell, you know I don't have anything to lose" to which Bell replied,"Well, I know that [but] (m)an I have got a twelve year old son." (XI, 49). At this point, the petitioner kicked Smith in the back and said, "get up white man;" Smith complied with the order. (XI, 49). The petitioner, who had the gun placed in Bell's back, ordered the witness behind the counter where Bell and Bobbie were standing. (XI, 50). A male or female customer came in and the petitioner told his

hostages to "act cool;" and the petitioner then put his arm around Bell and started talking about Bell's "good barbecue." (XI, 50). At some point, a woman (probably a woman and child) entered the store. (XI, 50-52).

The petitioner then told the extremely frightened Bobbie to put the money in the sack which the appellant had given him. During this time, a man Smith later identified as Charles House entered the store. (XI, 69). The petitioner, whose gun was visible, told House to get the hell out, which House promptly did. (XI, 51-53). The petitioner then searched both Bell and Smith for a weapon and indicated that he wanted more money. (XI, 53). The petitioner also took the witness' driver's license and told him,"I don't want you to even have these on you." (XI, 53). After taking Bell's and Bobbie's glasses and throwing them to the floor, the petitioner began shooting his victims even though they had offered no resistance or provocation and even though Bell had begged the petitioner not to do anything, as his twelve year old son was present. (XI, 69-70, 83). Bobbie was shot first and after he fell to the floor, Smith fell on top of him to protect him. Smith himself suffered a gunshot wound to the hand and throat. (XI, 53-54, 71). Smith then heard some pistol shots outside the store, followed by the sound of a shotgun being fired. The witness, who called the police, saw Bell return to the market holding a shotgun. (XI, 54-55). Smith stated that the petitioner was in the store not more than fifteen minutes. (XI, 62).

Soon after the crime, Smith viewed a photographic lineup and chose two pictures which "pretty close(ly)" resembled the intruder; one of the photographs depicted the petitioner. (XI, 65). Smith also viewed a corporeal lineup at which he did not identify the petitioner because he was not "absolutely positive" that the petitioner was the man, although he stated that he was sure it was

the petitioner even though the petitioner had his hair curled during the lineup. Immediately after coming out of the lineup room, the witness told investigators from the District Attorney General's Office and the Public Defender's Office that No. 2 (the petitioner) was the assailant. (XI, 65-67, 78).

Bob Bell testified that he owned two drive-in markets and a barbecue market in Nashville. On July 5, 1979, Lewis Smith and another young man were modifying a boat engine Bell had given his son, Bobbie, at Bob Bell's Market. (XII, 85-86). Around 9:00 p.m. or perhaps as late as 9:30 p.m., Bell drove the other boy home so he could get ready for a date; Bell returned within ten minutes. (XII, 89-90, 119-20). When he returned, Bobbie was watching television and Smith was still working on the engine. (XII, 91-92). As the witness walked back to where Smith was to check on the motor, the petitioner walked into the store. The petitioner pulled out a pistol and said "if you take another step I will blow your brains out." (XII, 92-93). The petitioner then ordered Bell to walk towards him, which Bell did. As the petitioner was patting down the witness, he threatened, "If I find a gun I am going to kill you." (XII, 94, 97). The petitioner then walked over to Smith and kicked him, ordering the "white boy to get up." At the petitioner's behest, Bell and Smith joined Bobbie behind the counter. (XII, 97-98).

While the petitioner and his captives were standing behind the counter, a woman and two children entered the market (the customers were apparently not together). (XII, 99, 140-41). While the woman was there, the petitioner told his victims to act natural and he started talking about Bell's "good barbecue." Although the woman could not see the petitioner's gun, which was a .32 or .38 caliber dark colored revolver, she could see Bobbie crying. (XII, 129-30, 134). After the customers left, the petitioner ordered Bobbie to fill a bag with

money from the cash register; Bobbie obeyed. (XII, 100-01). After getting this money, the petitioner searched Smith and Bell. While he searched Smith, Charles House came in the market and the petitioner ordered him to get out. (XII, 112, 143-46). During his search of Bell, the petitioner unzipped Bell's pants, stuck his hand down them and said, "I ought to blow your nuts off." (XII, 146). After taking Bell's and Bobbie's glasses and throwing them over the counter, the petitioner began shooting. Bell heard Bobbie holler and saw Smith fall on top of Bobbie. (XII, 102-03). Something knocked Bell to the floor, and the witness counted to ten before raising his head. When Bell looked up, he observed the petitioner walk toward him, point the gun at his head and pull the trigger as he turned his head. Fortunately, the witness threw his hands up and was only shot in the wrist. (XII, 103-04). Bell jumped up and got his shotgun (accidentally discharging it), heard two shots outside and saw the petitioner standing beside a car parked outside the store. (XII, 105-06). The witness ran outside and saw two men in the car who had been shot. He then began chasing the petitioner in a southern direction (toward Gilmore Avenue) before he lost sight of him. (XII, 107). Bell ran back to the store to check on his son and to stop a passing car for assistance in calling the police. (XII, 108).

The following day, Bell identified the petitioner from a photographic lineup and sometime later picked him out in a corporeal lineup. (XII, 113-14). According to Bell, the petitioner had been a regular customer for about four months prior to the incident. (XII, 148). During that time, the petitioner would visit the market four or more times a week, sometimes wearing his hospital uniform. (XII, 108-10). On one occasion, the petitioner told him he had been to Ohio and could not find a job; sometime later the petitioner told Bell he was working at Vanderbilt Hospital. (XII, 108-09). Two or three

days before the massacre, the petitioner was in the store and loaned a man some change so the man could purchase a quart of beer. (XII, 110). Although Bell did not know the man's name, he saw him in the crowd the night of the crime and asked him to tell the police the name of the individual who had loaned him the change. (XII, 111).

Officer Wesley Carter testified that he arrived at the crime scene at 10:04 p.m. (XII, 173). While trying to reduce the flow of blood from Bell's wound, the officer asked Bell if he knew who had done it or if he had seen the man prior to the incident. (XII, 173-76). Bell replied that the assailant had been in the store on previous occasions and that he thought the man was from Louisville, Kentucky. (XII, 176, 178). Bell pointed to a man in the crowd and told Carter that the man knew the assailant and had been in the store with him previously. (XII, 177). Carter spoke to this man and got his name (Leroy Johnson) and address; the man said he did not know anything about it. (XII, 177-78).

Dr. Christopher Ashhurst testified that he prformed post-mortems on James Moore, Charles House and Robert Bell, III. Each victim had died from massive hemorrhaging occasioned by a gunshot wound. He was able to recover projectiles from all three bodies, which he gave to Officer William Merriman. (XIII, 195-201).

Officer W. R. Arnold, a police photographer, arrived at the death scene at 10:25 p.m. (XIII, 208). By that time, the ambulances had transported Bell, Smith and Bobbie to the hospital. (XIII, 210). Arnold photographed the scene and identified the resulting photographs. (XIII, 216-221).

Officer Leslie Olson also arrived on the scene at 10:25 p.m. He recovered a bullet fragment from behind the counter and deposited it with the booking room. (XIII, 223, 225).

Officer William Merriman recovered the bullets

removed from the dead bodies and placed the bullets in the custody of the property room. (XIII, 228).

Patrick Garland, a senior firearms examiner with the Tennesee Bureau of Investigation, examined the five bullets which had been recovered from the victims and the crime scene. His analysis showed that all of the bullets were consistent with those normally used in a .38 caliber weapon, were fired from a revolver and were of different origins. (XIII, 229-39).

Areda Hereford testified that a driver for Supreme Cab named "James" dropped her off at her home on Elwood Avenue around 9:50 p.m. or 9:55 p.m. and then proceeded in the direction of Bob Bell's Market. (XII, 241-43). Close to 10:00 p.m., she heard noises which sounded as if firecrackers were being detonated and shortly thereafter her brother told her that the cab driver had been shot. (XIII, 243).

Walter Davis walked to the market around 9:55 p.m. (XIII, 246, 254). He saw a cab dropping off a female passenger on Elwood Avenue and then saw the cab drive to Bob Bell's Market and back into the parking lot. (XIII, 246-47). As the witness went into the store, he observed a man in the nearby telephone booth. (XIII, 247-48). While making his purchase, Davis observed a white man working on a motor, with Bell standing behind the white man and Bobbie standing at the cash register. (XIII, 249-50). When Davis left the store, the cab driver was alone in his cab and the man was still in the telphone booth. (XIII, 250). Davis later returned to the scene. (XIII, 252-53).

Amanda Perry stated she drove by Bob Bell's Market sometime before 10:00 p.m. She saw Bell in the parking lot hollering for help and holding a shotgun in his hand. At Bell's request, Perry's sister called the police. (XIII, 257-59, 261). After the ambulance had arrived, Perry heard Bell ask Michael Lawrence, "what

was that nigger's name that was down here the other night?;" Lawrence did not know. (XIII, 259-60, 262).

Michael Lawrence testified that he arrived at the market around 10:30 p.m. (XIII, 263-64). Bell told him that he (Lawrence) knew something about this and that the man who had given him some change two days previous had done it. Lawrence thought to himself that the petitioner had been in the store with him at that time, but didn't tell his thought to Bell. Lawrence further related that on the Thursday before the Saturday shooting, the petitioner loaned him money so he could purchase a quart of beer. (XIII, 266-67, 269).

Detective Larry Flair testified that at 2:00 p.m. on the day following the carnage, he displayed a photographic lineup consisting of six photographs to Bell at Baptist Hospital. (XIII, 271, 274). Bell identified a photograph of the petitioner. (XIII, 275-76).

Debra Ann Smith stated that she patronized Bob Bell's Market between 9:30 p.m. and 9:50 p.m. with her son and boyfriend's son. (XIII, 280-81). When she arrived, she saw a man using the phone in the telephone booth outside the store and a cab parked in front of the store. (XIII, 281-83). As she entered, she saw Bell, Bobbie, the petitioner and another boy (whom she alternately stated was white or black) behind the counter. (XIII, 284-86). Smith, who had known the petitioner for two years, "knowed that [the petitioner] was going to rob them" but did not see a gun. (XIII, 285-87, 318). She proceeded to purchase a soft drink from Bobbie, who was crying, and then left the store. (XIII, 287). Upon leaving, she noticed that the cab driver was still seated in his cab and the man who was in the telephone booth was talking to the driver through the window. (XIII, 318-20, 325). Smith returned to her boyfriend's home and told him that Bob Bell was going to be robbed. She then went to her own house and told her sister that there

was a robbery occurring at Bob Bell's Market (XIII, 287-88).

Victor Davis, who had twice been convicted of burglary and who was granted immunity from prosecution in the instant case, testified that he first saw his friend, the petitioner, around 3:00 p.m. on Tenth Avenue South on the day in question. (XIV, 337-340). They drove to East Nashville to pick up the petitioner's "old lady" (Merle Stanley) and then carried her to several liquor stores so that she could cash a check. Davis then drove the pair downtown and dropped them off. (XIV, 338, 340, 398-99). Around 4:00 p.m., Davis again saw the petitioner at the corner of Wayne and Belmont Avenues. (XIV, 341-43). They rode around together for awhile and then decided to go to Franklin to attend a motorcycle meeting. (XIV, 343).

Once in Franklin, the two purchased some chicken at Kentucky Fried Chicken and then followed some "dudes" to a gambling place near a high school. (XIV, 344). They gambled for an hour, during which time Davis thought he had won some money and the petitioner had lost some money. (XIV, 345). They then rode around some more and met three girls who were standing out on the street. After conversing with the girls for an hour or an hour and a half, Davis and the petitioner returned to Kentucky Fried Chicken to get something to eat. (XIV, 345-46). While they were parked at the restaurant, the petitioner told Davis he was going to rob it. The petitioner got out of the car, carrying a dark colored .38 caliber gun on his person, and approached the restaurant. After speaking to someone at the establishment, the petitioner returned to Davis' vehicle and said it was closed. (XIV, 347-49). They then stopped at a store across the street from Kentucky Fried Chicken, purchased some beer and proceeded to Nashville. (XIV, 350). Although Davis was not certain when they left Franklin, it was after 9:00 p.m., possibly 9:30 p.m., when they left. (XIV, 412).

They returned to Nashville via Franklin Road since Davis had a bad tire rim on his car. (XIV, 371-72, 403). Because of the tire rim, Davis estimated it took about forty-five minutes to get to Nashville. (XIV, 412).

Close to 10:00 p.m., Davis and the petitioner arrived in Nashville. (XIV, 410-11). They exited Franklin Road at Eighth Avenue South and proceeded to Twelfth Avenue South and Kirkland Avenue, which was one short block from Bob Bell's Market. (XIV, 353-54). Once there, the petitioner then exited the vehicle. (XIV, 353-54). Davis next saw the petitioner three or five minutes later about twenty to twenty-five yards from the petitioner's father's house on Gilmore Avenue. (XIV, 355-56). The petitioner got in Davis' car and said "I didn't mean to shoot that boy." (XIV, 360). The petitioner, who had a bag in his hand, threw a gun to the ground. (XIV, 386-87, 417). Davis got out of the car, retrieved the gun and sold it the next morning for forty dollars to an unknown man on Lafayette Street. (XIV, 387; XV, 418-21). Before selling the gun, Davis emptied it of bullets. (XIV, 421-22).

Davis and the petitioner went into the petitioner's father's house. The news was on television and Mr. Johnson, Sr. was watching it on the couch. (XIV, 358, 413). In the presence of his father, the petitioner counted about two hundred dollars from the bag; he gave Davis forty dollars of the money. (XIV, 358, 416). The petitioner told his father they had been to Franklin where they had been gambling. (XIV, 359). The petitioner also called Merle Stanley at Vanderbilt Hospital and spoke to her for ten minutes. (XIV, 359). Davis and the petitioner then left and drove to the Kwik-Sak where they purchased some beer and gas and met a couple of friends, Wayne Walker and Greg Daniels. They drove to Walker's house where they drank the beer. Daniels mentioned the incident at Bob Bell's Market; the petitioner was calm throughout

this time. Davis and the petitioner then went to the Regis Restaurant to eat before Davis dropped the petitioner off at the Sam Davis Hotel. (XIV, 360-64).

Davis next saw the petitioner on August 29th when he (Davis) was arrested on a burglary charge. While they were in jail together, on one occasion the petitioner told him to stick with what he was saying because there might be some police wanting to see them, "so we ain't going to talk about it, just don't talk to each other." (XIV, 365-66).

Davis admitted that he had given lengthy statements to both the petitioner and the prosecution on July 17, 1980, in which he omitted any incriminating reference to the petitioner and himself. (XIV, 350-52, 392; XV, 393-96). He also stated that he had gone to Franklin with investigators from the Public Defender's Office to show them where he and the petitioner had been on the day in question. (XIV, 369-71). According to Davis, he did not tell the investigators the important omissions from his previous statements because he did not want to get involved. (XIV, 352-373-74).

Davis further testified that he was arrested on the night of January 10, 1981, by Officer Patton at the intersection of Eighth and Wedgewood Avenues. According to Davis, Patton stopped the vehicle in which he was riding on suspicion of attempted armed robbery. After Patton found a shotgun in the car, Davis was taken downtown. (XIV, 375-77). Within thirty minutes of his arrival downtown, Davis was taken to the District Attorney General's Office where he spoke with Generals Shriver, Gray and Johnson and Investigator Sledge. (XIV, 379-80). After being advised of his right to the presence of his attorney, George Duzane, Davis asked them to call Duzane and they tried to do so. (XIV, 381-82). After repeating to them the substance of his previous statements, Davis then changed his story to what he testified at trial because

he did not want to be charged with something he did not do. (XIV, 383). No one told him that he would be indicted if he testified as a defense witness, but someone said he had to go to court and Davis assumed that meant he would be indicted. (XIV, 384-86). Davis also testified that he was treated "fine" and was not threatened in any way. (XV, 430). He admitted that he had drunk a little and had smoked a little marijuana prior to his arrest. (XV, 429-30).

After leaving the District Attorney General's Office around 4:00 a.m., Davis spoke with his attorney who told him that General Gray had been trying to reach him since the preceding Monday. (XV, 431-32). On Saturday afternoon, Davis met with defense counsel but did not tell him of the new developments in his statement since Duzane had advised him not to discuss it with anyone. (XIV, 390). On Monday, Davis and his attorney met with General Gray and Davis gave a formal statement. It was at this time that Davis was promised immunity, which the defendant interpreted as meaning that he would not be charged with anything pertaining to the instant case. (XIV, 387; SV, 432-33).

B. The Petitioner's Proof

The petitioner testified that he had lived with his father on Gilmore Avenue (two blocks from Bob Bell's Market) from January to May of 1980. (XV, 438). During that time, he frequented the market about twice a week. (XV, 444-45). Since May, however, he had lived at the Sam Davis Hotel and had visited the store only once on July 3rd when he gave Michael Lawrence some change with which to purchase beer. (XV, 445-56). The petitioner also stated that his mother lived in Louisville, Kentucky, and that he had been employed by the dietary department of Vanderbilt Hospital since the end of February. (XV, 439, 443).

Sometime before noon on July 5, 1980, he met Victor Davis on Tenth Avenue South. They picked up Merle Stanley in Bordeaux and took her to several liquor stores so that she could cash a check. (XV, 451-52, 455-56). Davis then carried the defendant and Stanley downtown and dropped them off. (XV, 456-57). After spending some time downtown with Stanley, the petitioner returned to Tenth Avenue South and again saw Davis. Around 3:30 p.m., the two decided to go to Franklin. (XV, 459-60).

Once in Franklin, the petitioner and Davis ate at Kentucky Fried Chicken. They then followed some men to a beer party which was being held near an old high school. (XV, 461). They gambled at the party, with the petitioner winning eighteen dollars and Davis also winning. (XV, 462-63). They then rode around Franklin and met four or five young black women who were standing on the sidewalk. While conversing with the women, Davis held one of the ladies' baby for awhile. (XV, 465-66). It was dark at this time and the petitioner and Davis returned to Kentucky Fried Chicken to eat. There, a young white lady told the petitioner that the restaurant was closed, so they returned to Nashville via Franklin Road. (XV, 466-68). According to the petitioner, they did not take the interstate because they did not know how to reach it and he noticed no difficulties with Davis' car. (XV, 467-68).

When the petitioner and Davis reached Nashville, they exited at Tenth Avenue and went directly to his father's house. (XV, 469). His father was watching a movie on television. The petitioner called Merle Stanley and spoke to her for eleven or twelve minutes; Stanley told him that she needed him to pick her up from work at Vanderbilt Hospital. (XV, 472, 486). The news came on after the petitioner completed his call and the petitioner then told his father he had been to Franklin and had won eighteen dollars. (XV, 474). Davis pulled out nineteen

or twenty dollars which he said he had won gambling. (XV, 473). Just as the petitioner and Davis were leaving, Merle Stanley called to tell the petitioner not to pick her up. (XV, 476, 486). While they conversed for about five minutes, Davis was outside. (XV, 476-77). After having been at the house at least twenty-two to twenty-five minutes, the petitioner and Davis left to go to the Kwik Sak. While there, they purchased some beer and gas and met two of Davis' friends. (XV, 475, 477). All four went to one of the friends' house where they drank beer and smoked marijuana. During this time, a young lady came up and told them what had happened at Bob Bell's Market. (XV, 477-79). The petitioner and Davis left and then ate at a restaurant near the Greyhound Bus Station. Davis then dropped him off at the Sam Davis Hotel. (XV, 480-81).

The petitioner further admitted that he could not remember Davis' name when he initially spoke to the police and his own defense attorney. (XV, 492). He also admitted having owned a .22 caliber derringer, but said he had lost it. (XV, 486). Finally, the petitioner denied that he had robbed or shot the people at Bob Bell's Market; that he had told Davis that he was going to rob the Kentucky Fried Chicken; that he had told Davis to "stick to his story;" and that he had told Davis that he had not meant to "kill that child." (XV, 470, 481-82, 489-91).

Gloria Patterson, a resident of Franklin, testified that she met the petitioner on the night of July 5, 1980, in Franklin. She permitted the petitioner to hold her baby. (XVI, 508-10).

Cecil Johnson, Sr., the petitioner's father, stated that the petitioner and Davis came to his house on Gilmore Avenue just as the news was coming on television. The petitioner told him that he had been gambling in Franklin and showed him thirty or thirty-five dollars;

the witness did not see any other money. (XVI, 514-15). His son called Merle Stanley and they were on the phone for a total of ten minutes. (XVI, 515-518). When the petitioner and Davis were leaving, Stanley called the petitioner and they spoke for a few minutes more. (XVI, 519). The petitioner and Davis left the house as the weather report was coming on. (XVI, 520). After they had left, Stanley called again while the sports report was on and the witness told her that his son had left. (XVI, 521). Johnson also testified that his son denied any knowledge of the crime upon being informed the next day that the police wanted to talk to him. (XVI, 527).

Jerome Patterson stated that sometime before midnight on July 5th, he patronized Bob Bell's Market. He saw Bell, Bobbie and two white men in the store. (XVI, 529-30). As he was returning home in a northerly direction (away from Gilmore Avenue), he saw a black cab back into the parking lot. Patterson then heard a shot and saw Bell run out of the market holding his arm. He then heard someone shout "dere he go running down the alley." (XVI, 533). The witness did not observe anyone leave the market before Bell and did not see anyone in the phone booth. (XVI, 534).

Merle Fran Stanley testified that she knew the petitioner from working together at Vanderbilt Hospital. (XVI, 537). On the morning of July 5th, the petitioner and Davis drove her to several liquor stores so she could cash a social security check. (XVI, 538-41). Davis dropped her and the petitioner off downtown; sometime after 1:00 p.m. she took a bus to work. (XVI, 541).

At 9:30 p.m. or 9:45 p.m., the petitioner called her at work and they conversed together until 9:55 p.m. (XVI, 542-43). Around 10:07 p.m. or 10:10 p.m., she called the petitioner and they spoke until "something to eleven [o'clock]." (XVI, 547). She called him again and his father said he had just left. (XVI, 544-46).

Stanley stated that she did not ask the petitioner to pick her up that night. (XVI, 550). She also admitted having visited the petitioner in jail, but testified that they did not discuss the case. (XVI, 548).

Jeannette Edging testified that she was employed by the Franklin Kentucky Fried Chicken on July 5, 1980. At 9:04 p.m. or 9:05 p.m., she clocked out. A man she later identified as the petitioner came to the door about 9:20 p.m. or 9:25 p.m. and she told him that the restaurant was closed. The petitioner had been parked in a green car in the parking lot for awhile. (XVI, 562-66). When she went outside to wait for her ride, the petitioner was still there. He left and her ride arrived about five minutes later, which was shortly after 9:30 p.m. (XVI, 562, 567).

C. The Respondent's Rebuttal Proof

Detective Gordon Larkin testified that, pursuant to a search warrant, he removed from the petitioner's motel room one blue and one green uniform from Vanderbilt Hosiptal; the petitioner had denied owning these uniforms on cross-examination. (XVI, 505-07, 568-71).

Investigator James Sledge from the District Attorney General's Office stated that on July 20, 1980, he travelled the route from Franklin to the Petitioner's father's house via Franklin Road. The journey took twenty-nine minutes at a speed of forty-five miles per hour. According to Sledge's calculations, if a person left Franklin at 9:25, he would arrive in Nashville at 9:54. (XVI, 581-82).

II. THE SENTENCING PHASE OF THE TRIAL

A. The Respondent's Proof

The respondent relied upon the evidence adduced at the guilty phase of the trial to establish the aggravating circumstances of the crime.

B. The Petitioner's Proof

Cecil Johnson, Sr. testified that he and the petitioner's mother produced seven children. The petitioner was seven years old when they separated and was raised by the witness. The separation had no impact on the petitioner, who had never been a "problem." (XIX, 21-22). The petitioner began working at fourteen and dropped out of school at sixteen. (XIX, 23). The petitioner wanted to be a chef and was very proud of his job at Vanderbilt Hospital. (XIX, 24-25). Finally, the witness testified that the petitioner did not attempt to flee upon being told the police were looking for him regarding the incident at Bob Bell's Market. (XIX, 28-29).

Linda White, the petitioner's sister, testified that the petitioner was a "normal" boy and brother while they were growing up. (XIX, 31-32). She also stated that the petitioner, while unemployed, temporarily took care of another sister's children after that sister's husband died. (XIX, 32-33). According to White, the petitioner and his wife separated after another man tried to prevent him from entering his own house. (XIX, 33).

In the presence of the jury, Dr. Leslie Hutchinson, an expert in the field of psychology, discussed his familiarity with the rehabilitative services available within the Department of Corrections. (XIX, 65-67). In Dr. Hutchinson's opinion, the rehabilitative programs can have a positive effect on some inmates depending upon the individual inmates' personality characteristics. (XX, 68). As he had never interviewed the petitioner, Dr. Hutchinson stated that he held no opinion whether the petitioner could benefit from the programs. (XX, 69). He also admitted that psychopaths are generally more resistant to rehabilitation. (XX, 74-75).

Gerald Grubb, a chaplain employed by the Department of Corrections, testified that the available religious rehabilitative services can change some inmates and has

no effect on others. (XX, 91-95).

Following the completion of their deliberations, the jury returned a verdict of death for the murders of Bob Bell, III, James Moore and Charles House. As to the murder of Bell, the jury found the presence of three aggravating circumstances: the petitioner knowingly created a great risk of death to two or more persons other than the victims murdered during his act of murder; the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the petitioner; and the murder was committed while the petitioner was engaged in committing robbery. As to the murders of James Moore and Charles House, the jury found the presence of the aggravating circumstances that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the petitioner. (XX, 126-28). Thereupon, the trial court accepted the jury's verdict and sentenced the petitioner. (XX, 129-30).

III. THE POST-TRIAL MOTION HEARING

Officer John Patton testified that he arrested Victor Davis for public drunk and carrying a weapon after stopping the vehicle in which Davis was a passenger. The vehicle was stopped after Officer Patton observed the highly suspicious conduct of two of the men in the vehicle at a service station. (XXI, 38-45).

About 5:30 p.m. on that day, he spoke with Detective Larkin concerning Davis, but did not remember the specifics of that conversation. (XXI, 38). Patton testified that he might have made one pass by an area on Tenth Avenue South to look for Davis. This area was a place where young black males frequently congregate to drink and gamble and the officer usually checks it three or four times nightly. (XXI, 51). At the time Patton arrested Davis, he radioed Larkin who told Patton

that he wanted to speak to Davis. (XXI, 46, 49-50). Patton took Davis and his companions downtown to obtain warrants on them and gave Davis' committal to Larkin around 1:00 a.m. (XXI, 46, 55).

Detective Gordon Larkin testified that around 5:30 p.m. on January 9, 1981, he spoke to Officer Patton and told him that if Patton saw Victor Davis, he wanted to talk to Davis. (XXI, 56). The day before, General Gray had requested Larkin to try to locate Davis, as Gray wanted to speak to him. (XXI, 62-63). Larkin was contactd by Patton between 11:30 p.m. and 11:40 p.m. on January 9th and Larkin proceeded to the intersection of Eighth and Wedgewood Avenues where Davis had been arrested. (XXI, 56, 64). Around 1:00 a.m., Larkin took Davis to the District Attorney General's Office to speak with Generals Shriver, Gray and Johnson and Investigator Sledge. (XXI, 57). During the interview, Davis was advised of his right to the presence of an attorney; Davis indicated he wanted to talk to them about the instant case. (XXI, 57-58). For the first hour and a half, Davis repeated the substance of his earlier statements in which he provided the petitioner with an alibil. (XXI, 559-60). However, after Davis had conferred with General Gray in private, Davis told them what he had testified to at trial. (XXI, 60-61). The interview was completed around 4:00 a.m., at which time the witness drove Davis home. (XXI, 61, 70).

Sterling Gray, an Assistant Attorney General, testified that he spoke with Davis' attorney, George Duzane, on January 6th and 7th and told him he wanted to speak to Davis. Duzane told him he had been in contact with Davis and that Davis was supposed to come by his office. (XXI, 73). On January 8th, Gray saw Detective Larkin and told him he needed to talk to Davis. (XXI. 73).

Preceding the interview in question, Gray advised Davis of his right to the presence of an attorney. Davis

requested his attorney but before Gray could even dial the phone, Davis stated that he would talk to them about the present case. (XXI, 76). During the private meeting in Gray's office which Davis requested, Davis told Gray that he did not want to be known as a "snitch" and that "this is heavy;" Davis then proceeded to detail the events of the fatal night in conformity with his trial testimony. (XXI, 78). Nothing was said to Davis concerning a grant of immunity until Monday morning, at which time Davis gave a formal counseled statement. (XXI, 79). Gray added that Davis was calm and not scared during the Saturday morning interview. (XXI, 78). Gray also stated that the matter of indictment was raised by Davis, was not discussed at any length, and was couched in terms of Davis leaving himself open to be indicted. (XXI, 82-83).

HOW THE QUESTIONS WERE RAISED BELOW

The petitioner did not object to the alleged "conversion" of witness Victor Davis prior to trial by way of a motion in limine, a motion to suppress, or a motion for continuance. Likewise, the petitioner did not object to the admission of Davis' testimony during trial. The petitioner initially objected to the alleged "conversion" of Victor Davis at the trial court level in the post-trial motion hearing.

In his motion for a new trial and on his direct appeal to the Supreme Court of Tennessee, the petitioner raised the same complaints he presents here concerning the alleged "conversion" of Victor Davis.

As to the five instances of alleged prosecutorial misconduct of which the petitioner complains, the petitioner preserved his complaints in his motion for a new trial and raised the issues on his direct appeal to the Supreme Court of Tennessee. However, the petitioner at trial contemporaneously objected to only two of the allegedly declarative statements made by the prosecutor during the direct examination

of Victor Davis and the petitioner did not object prior to or during trial to the remaining four instances of alleged prosecutorial misconduct.

The petitioner's complaint concerning the trial court's suppression of the proposed testimony of Dr. Thomas Ogletree regarding the relationship between youth and accountability for decision-making or maturity was preserved by the petitioner at trial, in his motion for a new trial and on his direct appeal to the Supreme Court of Tennessee.

REASONS FOR DENYING THE WRIT

The respondent insists that the Supreme Court of Tennessee correctly affirmed the trial court's judgment approving the jury's verdicts finding the petitioner guilty of three counts of first degree murder, two counts of armed robbery and two counts of assault with the intent to commit first degree murder and fixing his punishment at death on the first degree murder convictions and life in the state penitentiary on the remaining convictions. The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by this Court or decide such a question in a way not in accord with the applicable decisions of this Court, another state court of last resort, or a federal court of appeals. See Supreme Court Rule 19(1)(a). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

I. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE CUMULATIVE EFFECT OF ALLEGED PROSECUTORIAL MISCONDUCT VIOLATED HIS RIGHT TO A FAIR TRIAL AND INFRINGED UPON HIS RIGHT TO PREPARE AND CONDUCT HIS DEFENSE.

A. The prosecution did not improperly "convert" Victor Davis into a witness hostile to the defense.

Under the guise of an allegation of "prosecutorial misconduct" concerning the use of Victor Davis as a witness in the respondent's proof-in-chief, the petitioner apparently argues that the prosecution illegally "converted" Davis from an alibi witness into a witness hostile to the defense, thus denying the petitioner his constitutional right

to prepare and present a defense. According to the petitioner, Davis was a "declared witness" for the defense and was thus somehow required to testify in accordance with his earlier statements in which he corroborated the petitioner's alibi defense and was correspondingly prohibited from discussing his knowledge of the case with the prosecution.

In rejecting the petitioner's argument on this point, the Supreme Court of Tennessee reiterated the well-established rule that it is not possible in law to "convert" a witness in a criminal case into a witness for either the prosecution or the defense since prospective witnesses are not partisans and do not belong to either party. 632 S.W.2d at 546. As stated by the court:

> The purpose of an investigation and trial is to get to the truth. This sometimes entails the interrogation of witness (sic) on several occasions before truth is distilled in its purity. Neither party can have its investigation limited merely by declaration that a witness will testify in behalf of the other party.

Id.

Although the petitioner quarrels with the state courts' analysis of his complaints from the posture of the petitioner attempting to rely upon the constitutional rights of Victor Davis in asserting that his Sixth Amendment right to compulsory process and his Fourth Amendment right to due process were violated by the actions of the prosecution, the respondent submits that the state courts did not misapprehend the actual thrust of the petitioner's argument and correspondingly correctly refused to find a violation of the petitioner's constitutional rights. The respondent additionally asserts that the petitioner's reliance upon Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) and Washington v. Texas, 388 U.S. 14, 18 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) is grossly misplaced upon the facts presented here and

thus no re-evaluation of these cases is necessary or required.

In Webb v. Texas, supra, the trial judge not only threatened the defendant's sole witness with a charge of perjury and detailed at great length the ramifications of a conviction for such if the witness testified untruthfully, but also encouraged defense counsel to permit the witness to refuse to testify. 409 U.S. at 96-97. Under these circumstances, it is not difficult to comprehend either the reason for the witness' disinclination to testify as to any matter or the per curiam opinion of this Court which found the defendant's due process rights were violated since the trial judge's unduly harsh admonition precluded the witness from voluntarily exercising his prerogative to testify or not to testify. 409 U.S. 97-98. Similarly, Washington v. Texas, supra, involved the application of a state statute which arbitrarily disqualified co-defendants from testifying for the defense, but not the prosecution. After finding that the Sixth Amendment's right to the compulsory process of witnesses encompassed the right to due process of law in a state criminal trial, this Court aptly summarized its findings:

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.

388 U.S. at 23.

The respondent further submits that the petitioner's citation to State v. Burri, 87 Wash.2d 175, 550 P.2d 507 (1976) is likewise misplaced. In an en banc decision,

the Washington Supreme Court held that the prosecution violated a state statute which apparently permitted the calling of a "special inquiry hearing" to investigate suspected criminal activities when it summoned the previously indicted defendant's alibi witnesses to such a hearing to give sworn testimony. Neither the defendant nor his counsel were present at the ex parte hearing and the prosecuting attorney admonished or instructed the witnesses to not discuss their testimony therein with anyone. Beyond finding that the testimony was illegally obtained, the court also held that the defendant had been denied his right to prepare for trial since the defendant, in view of the prosecutor's instructions, was precluded from preparing a defense. 550 P.2d at 511.

The Burri court also stated that it could not hold that the trial court abused its discretion in dismissing the underlying indictment against the defendant, since the transcript of the testimony garnered from the unauthorized special inquiry hearing was not in the appellate record and thus the court had no way to independently determine whether the violation of the defendant's right to counsel and his right to the compulsory process of witnesses was harmless. 550 P.2d at 512-13.

In marked contrast to the preceding cases, the instant case does not contain elements of a trial judge effectively forcing the sole defense witness from the stand, a state statute which unconstitutionally and arbitrarily disqualifies any co-defendant from testifying in defense of the defendant, or a violation of a state statute permitting the taking of sworn testimony at a special inquiry hearing, which violation was compounded by the prosecuting attorney's instruction to defense witnesses which simply sealed the lips of such witnesses. Quite simply, the case sub judice involves nothing more than the voluntary decision of Victor Davis to renounce his previous statements regarding the petitioner's involve-

ment in the crime in favor of testifying truthfully at trial. When viewed within the context of this analysis, it is readily apparent that the Supreme Court of Tennessee correctly interpreted the crux of the defendant's argument and correctly rejected such argument under the facts of the case.

B. The Supreme Court of Tennessee fully considered and correctly rejected the petitioner's factual and legal contentions regarding the cumulative effect of alleged prosecutorial misconduct at trial.

The petitioner concedes that the five instances of alleged prosecutorial misconduct of which he complains do not, in and of themselves, present a substantial federal question.[2] However, according to the petitioner, these instances are augmented in their effect to the magnitude of a federal question when viewed in the context of the prosecutions's "conversion" of Victor Davis from an alibi witness to a witness for the prosecution.

In response, the respondent respectfully submits that upon full consideration of the record, the Supreme Court of Tennessee correctly concluded that the petitioner's allegations had no basis in fact or law in the context of this case. The respondent additionally contends that there is no indication that the Supreme Court of Tennessee in its consideration of the case ignored the petitioner's

---

[2] These instances of alleged prosecutorial misconduct include: the form of the questions asked of Victor Davis on direct examination, portions of the prosecuting attorney's closing argument during the guilt phase of the trial wherein the prosecutor allegedly injected his personal opinion concerning the veracity of Victor Davis, a portion of the prosecuting attorney's closing rebuttal argument during the guilt phase of the trial wherein the prosecuting attorney argued matters not in evidence, the alleged withholding of notice to the defense of the existence of Debra Ann Smith and the notice given to the petitioner by the respondent as to the exact time of the commission of the crime.

"cumulative effect" theory in rejecting the petitioner's complaint. Given that the highest court in Tennessee correctly found no impropriety in the actions of the prosecution prior to and during trial, it is clear that the very underpinning of the petitioner's argument that a substantial federal question is raised by an accumulation of instances of alleged prosecutorial misconduct, is destroyed and the petitioner's position on the matter is accordingly without merit.

II. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN SUPPRESSING THE PROPOSED TESTIMONY OF DR. THOMAS OGLETREE REGARDING THE RELATIONSHIP BETWEEN YOUTH AND ACCOUNTABILITY FOR DECISION-MAKING OR MATURITY.

The petitioner asserts that the Supreme Court of Tennessee and the trial court erred in ruling inadmissible during the sentencing phase of the bifurcated trial the proposed testimony of Dr. Thomas Ogletree regarding the relationship between youth and accountability for decision-making or maturity. (XX, 86, 88). According to the petitioner, the exclusion of the proposed testimony of Dr. Ogletree deprived the jury of the guidance necessary to evaluate the mitigating factors the petitioner sought to propound. The respondent respectfully submits that the proposed testimony was properly suppressed.

In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), this Court stressed the crucial importance of an informed decision-making body charged with determining whether a sentence of life or death should be imposed in a capital punishment case and opined that "(w)hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." (Emphasis supplied).

428 U.S. at 276; see also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 1859 (1976); Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In analyzing the instant complaint, the Supreme Court of Tennessee noted that Tenn. Code Ann. § 39-2404(c) is significantly broader than the federal requirements of due process in that the statute permits the admission into evidence of "any matter that the court deems relevant to the punishment...regardless of its admissibility under the rules of evidence."

In the context of the instant case, the respondent asserts that the trial court properly excluded the tendered testimony as not being relevant to this particular petitioner and that the Supreme Court of Tennessee correctly concurred in the trial court's determination. During a jury-out hearing, Dr. Ogletree admitted that he had never interviewed or treated the petitioner and that he had not reviewed the petitioner's record. (XX, 86). Thus, Dr. Ogletree's proposed testimony was not relevant to the nature and circumstances of the crime or the petitioner's character, background history and physical condition and could not possibly have assisted the jury in making an informed decision as to the proper sentence to impose upon this particular petitioner. Specifically bearing in mind that the trial court did not exclude any relevant evidence as it pertained to this individual petitioner or the circumstances of this particular crime, the respondent insists that the exclusion of the tendered proof was proper in all respects.

The respondent additionally asserts that the petitioner's reliance upon Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, ___ L.Ed.2d ___ (1982) is misplaced and is of no avail. In Eddings, this Court reversed the sentence of death imposed upon a sixteen year old defendant where the sentencing judge refused to consider

as a matter of law the defendant's violent and turbulent family history. Throughout the opinion, the Court repeatedly stressed the importance of the sentencing body having before it any mitigating evidence relating to the individual defendant's character or background and relating to the circumstances of the particular crime. In contrast to the Court's finding that the mitigating evidence of Eddings' background and mental and emotional development was individual or peculiar to Eddings, the proposed testimony here had no relationship to the uniqueness of the petitioner's character or to the circumstances of the crime. The respondent therefore respectfully posits that Dr. Ogletree's testimony was properly excluded as being irrelevant to the issue of the proper punishment for this particular petitioner.

CONCLUSION

For the reasons stated herein, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BROWN
Deputy Attorney General
-Counsel of Record-
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7859

KYMBERLY LYNN ANNE HATTAWAY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2216

AFFIDAVIT OF CERTIFICATE OF SERVICE

STATE OF TENNESSEE)
) ss
COUNTY OF DAVIDSON)

I, ROBERT A. GRUNOW, being first duly sworn, make oath that I am a member of the Bar of the Supreme Court of the United States. I have previously entered my appearance as counsel of record in behalf of the respondent in this cause, the State of Tennessee.

I further certify that on this 19th day of August, 1982, I deposited ten copies of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court and within the time allowed for filing; that I deposited one copy of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Honorable J. Michael Engle, Suite 100, 306 Gay Street, Nashville, Tennessee 37201, and within the time allowed for service; that I deposited one copy of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Honorable Robert L. Smith, Suite 1000, Parkway Towers, Nashville, Tennessee 37219, and within the time allowed for service.

I further certify that all parties required to be served have been served.

ROBERT A. GRUNOW
Deputy Attorney General

Sworn and subscribed before me this 19th day of August, 1982.

NOTARY PUBLIC

My Commission Expires:

July 21, 1985